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Utilitarian Biopolitics

Anne Brunon-Ernst

UTILITARIAN BIOPOLITICS: BENTHAM, FOUCAULT AND MODERN POWER

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BY

Anne Brunon-Ernst

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Anne Brunon-Ernst
January 2012

GENERAL INTRODUCTION

> Government, here, refers to all endeavours to shape, guide, direct the conduct of others, whether these be the crew of a ship, the members of a household, the employees of a boss, the children of a family or the inhabitants of a territory. And it also embraces the ways in which one might be urged and educated to bridle one's own passions, to control one's own instincts, to govern oneself. Foucault thus implied that, rather than framing investigations in terms of state or politics, it might be more productive to investigate the formation and transformation of theories, proposals, strategies and technologies for 'the conduct of conduct'.[1]

Utilitarian Biopolitics is the study of the relationship between Jeremy Bentham, the eighteenth-century utilitarian philosopher, and Michel Foucault, his most prominent twentieth-century critic. It offers a new perspective on Foucault's biopolitics, drawing on material from the latest edition of Bentham's *Collected Works*, from yet unpublished Bentham manuscripts, and from Foucault's recently published lectures at the Collège de France. This book's title – *Utilitarian Biopolitics* – emphasizes the means by which Foucault's thought employed a framework of ideas and concepts drawn from Bentham's writings. Simultaneously, the book also uses Foucaultian concepts to analyse Bentham's theory on power. In doing so, it tests the validity of Foucaultian concepts and fleshes out new biopolitical concepts (biopolitical pleasure, biopolitical pain and biopolitical language) at the intersection of Bentham and Foucault's theoretical models, and stresses the utilitarian origins, construction and operation of biopolitics. The book's main argument is that Foucault assimilated Bentham's utilitarianism when forging his theories on government and that a recognition of this source of Foucault's inspiration allows for a reconsideration of the concept of biopolitics itself.

Historiography

In 1975, with the publication of *Discipline and Punish*,[2] Foucault put Bentham back on the map of intellectual history and prompted a series of supporting commentaries.[3] From the end of the nineteenth to the middle of the twentieth centuries,[4] if the 1901 work of Elie Halévy is excepted, Bentham had fallen into a

relative obscurity.[5] Strangely, Bentham scholars have not adequately appreciated Foucault's putting Bentham back into the spotlight. Instead, Foucault has been criticized for having portrayed Bentham as the inventor of disciplines, overshadowing Bentham's achievements in other fields of thought; he has been considered as *persona non grata* in the world of Bentham studies.[6] In the 1990s, the relationship between Bentham and Foucault scholars had reached a standstill. Bentham was the forerunner of Big Brother for the latter and, for the former, Foucault had omitted to point out the fact that Bentham had written works other than *Panopticon; or The Inspection-House*.

Change came in the 1990s, when two French scholars, Jean-Pierre Cléro and Christian Laval, developed an interest in early classical English utilitarianism, and started translating Bentham's works into French.[7] In 2003, they created the Centre Bentham and young researchers joined them. Together they have translated,[8] commented[9] and circulated Bentham's thought to a French academic environment that was hostile or indifferent to utilitarianism. In 2006, Laval made a groundbreaking speech at the 'Bentham and France' symposium.[10] He studied Foucault's late Collège de France lectures, especially *The Birth of Biopolitics*, and proved that Foucault read Bentham beyond the *Panopticon* writings and that there were similarities between Bentham's utilitarianism and the conceptual grid Foucault used to analyse biopolitics. The present book finds its source in this observation.

From this reconsideration of the Bentham–Foucault relationship, research moved in two separate but complementary directions. The first tried to make sense of the Panopticon with a Foucault who had read and understood Bentham more than was initially thought. These explorations gave birth to a book entitled *Beyond Foucault, New Perspectives on Bentham's Panopticon*.[11] The second direction explored the utilitarian roots of Foucault's thought, and the proceedings of the workshop were published in *Revue d'études benthamiennes*.[12] These two volumes help to understand the assumptions at the source of *Utilitarian Biopolitics*.

Panopticism, as encapsulating one moment in the Bentham–Foucault relationship, was mapped in *Beyond Foucault*. Therefore, unless it is essential to the discussion of *Utilitarian Biopolitics*, the Panopticon/panopticism issue will not be examined and readers will be referred back to *Beyond Foucault*. The second reason lies deeper within the shifts in French research on Bentham and Foucault. Interestingly, at the workshop on 'Is Foucault Utilitarian?', which examined the links between Bentham's utilitarianism and Foucault's thought, none of the speakers dealt with the Panopticon. As one speaker aptly pointed out, he skipped over the panoptic interlude.[13] Following the publication of *Discipline and Punish* in 1975, the Panopticon became an obstacle in the path of the study of the Bentham–Foucault relationship, but now that we have become aware of this relationship which underpins *The Birth of Biopolitics* and which can be read retrospectively between

the lines of *Discipline and Punish*,[14] it is possible to consider Bentham's biopolitics and Foucault's utilitarianism without the overhanging shadow of the Panopticon.[15] Why shy away from the Panopticon? Is it because, as Janet Semple writes: '[The Panopticon writings] are ... disturbing and create problems for Bentham's admirers'?[16] The reason simply lies in the fact that the Panopticon has taken far too much space in discussions on Bentham and Foucault, and should be cut down to a more modest size. More generally the focus of this book is on the utilitarian source and framework of biopolitics. The Panopticon is not central to this argument.

Utilitarian Biopolitics uses Bentham's utilitarianism to reflect on Foucault's biopolitics. The relationship between both authors has hitherto been largely neglected in the developing literature on biopolitics and biopower.[17] Significantly, the existing literature focuses on Foucault and his contemporaries, on Foucault as a historian, or on the application of Foucaultian concepts to our contemporary society (as in the case of governmentality studies). Scholars have not yet discussed the influence of Bentham's thought in framing Foucault's concepts of governmentality and biopolitics. This book will contend that Bentham's influence on Foucault permits our re-reading of the concept of biopolitics, and ultimately re-shapes its scope and meaning.

Methodology

The present study rests on two concepts: 'biopolitics' and 'utilitarianism'. Foucault coined the term biopolitics because he wished to analyse the operations, functions and effects of power from the perspective of population rather than of territory. The term biopolitics is now a much traded currency in the market of ideas. It is used in a wide range of fields, including bioethics, biotechnologies, sociology and politics. The present research firmly rests on Foucault's definition of biopolitics, understood as the style of government that regulates population through all aspects of human life.

'Utilitarianism' refers to the theories circulated from the eighteenth century onwards, which emphasized utility as the goal of government. Bentham is thought to be one of the major thinkers in the field. The concept itself can be considered from different viewpoints (anthropological, epistemological, ethico-normative and technico-political). Whether the utilitarian calculus is descriptive of or prescriptive towards the real world, it always sets itself as a validating factor, and thus can be operative in politics.[18]

This volume reconsiders Foucault's theories on power from the view point of classical utilitarianism and offers new insights on utilitarian theory thanks to Foucault's concepts. In so doing, I hope to renew thinking on modern power and to propose a new understanding of power as the traditional divisions of a binary power are no longer appropriate to describe the workings of society:

> 'Who holds power? In whose interests do they wield it? How is it legitimated? Who does it represent? To what extent does it hold sway across its territory and its population? How can it be secured or contested, or overthrown?' State/civil society; public/private; legal/ illegal; market/family; domination/emancipation; coercion/freedom: the horizons of political thought were established by this philosophical and sociological language.[19]

The specificity of Foucault's definition of power is that it refuses the Marxist binary oppositions in society and uncovers a complexity of relationships, which are horizontal as well as vertical, and which are networked areas of shifting power as well as power radiating from a central source.[20] In so doing, the definition offers ways to understand politics of contestation.[21] Foucault considers that 'practices of government are deliberate attempts to shape conduct in certain ways in relation to certain objectives'.[22] Biopolitics is therefore closely intertwined with the concept of 'governmentality'. The term has become widely used and its meaning has expanded beyond Foucault's initial definition of governmentality:

1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of the very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security.
2. The tendency that, over a long period and throughout the West, has steadily led toward the pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power – which may be termed 'government' – resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of knowledges [*savoirs*].
3. The process or, rather, the result of the process through which the state of justice in the Middle Ages transformed into the administrative state during the fifteenth and sixteenth centuries and gradually becomes 'governmentalized'.[23]

Nowadays, there are three additional meanings to the term. It can be understood as the term 'government' to which the suffix -ity is added; as the study of government mentalities; or as the rationality underlying government practice. The present study will not distinguish among these four uses or meanings.

Scholars lack the methodological tools necessary to carry out a comparison between both authors. Bentham and Foucault did not live in the same century; they did not even speak the same language. Foucault read some of Bentham's works, but he is not a Bentham scholar. When quoting Bentham in his writings, Foucault's aim was not to interpret Bentham's thought, but to use his theories, projects and concepts to feed into his own strategic discourse.[24] Moreover disciplinary boundaries are blurred in both authors. At Bentham's time, the division into disciplines as we know them today was underway, but not effective. Bentham's economic writings deal with political economy, rather than economics.

Foucault's methodology cuts across the disciplinary divides to create his own tool to analyse his sources. He names his methodology 'archeology'.[25]

As regards the notion of influence, it is unfortunately too vague to be of much help in the present venture. As Foucault notes:

> Then there is the notion of influence, which provides a support – of too magical a kind to be very amenable to analysis – for the facts of transmission and communication; which refers to an apparently causal process (but with neither rigorous delimitation nor theoretical definition) the phenomena of resemblance or repetition; which links, at a distance and through time – as if through the mediation of a medium of propagation – such defined unities as individuals, *oeuvres*, notions, or theories.[26]

If the term 'influence' is used within this volume, it is by way of a figure of speech only.

Researchers investigating the relationship between both writers finds themselves in a methodological maze. As the present endeavour is not without its methodological pitfalls, let the author be judged not on the methodological coherence, but on the relevance of the concept of 'utilitarian biopolitics' investigated.

Argument

What of Foucault's thought was inherited from Bentham's? *Utilitarian Biopolitics* follows on from *Beyond Foucault*, while comparing the thought of these two philosophers far beyond the Panopticon, which was the aim of *Beyond Foucault*. The present volume tackles issues relating to interests (pleasure and pain, original sensations of Bentham's calculus), law (direct and indirect legislation), ethics, economics and language, while skipping over the Panopticon moment.

This analysis presents new ways that will make it possible to better understand the utilitarian foundations of Foucault's biopolitics. The findings are significant in three areas.

First, Foucault described the mechanisms of power in the contemporary world under the concept of biopolitics. This concept, which was developed by English radicals at the end of the eighteenth century, was based upon interests, which themselves were made up of pleasures and pains. The analysis of pleasures and pains in Part I reveals how the comparative study of Bentham's and Foucault's writings helps to elaborate an operational concept of biopolitics. Indeed, the way Bentham made pleasure work shows that the position of pleasures in Foucault's work is not tenable and a minimal utilitarian calculus is necessary to make Foucault's pleasures operate within a biopolitical environment. Conversely, Foucault showed the limits of Bentham's way of building interests. Through the study of horrendous acts, Foucault demonstrated that the calculation of interests was not a theoretical frame that would account for all the acts, in particular for some criminal acts. Throughout the comparative study of pleasures and pains,

biopolitical interest is being built up as a norm of action, in which the conformity to interest is aimed at and the motive for the action is itself positioned on a spectrum spanning from instinct to interest.

Secondly, the issue of the normativity of interest, which is first raised in Part I, is tackled in Part II. This analysis makes it possible to understand the key role played by the norm within the biopolitical space. *Utilitarian Biopolitics* questions the contemporary historiography on the place of law in Foucault's work. The theory that Foucault expelled the law in the biopolitical era, or at least minimized and limited it, is founded on a restrictive definition of the law. Bentham, with a broad definition of what a law is, was able to bring direct and indirect legislation together with political economy under the general category of law. What is common to Foucault's biopolitical operation and Bentham's legal one is the norm. For Bentham, the law draws its force from meta-norms of content, which is the interest examined before, and from meta-norms of form, which is the disposition to obey and which originates in the relation between the ruling few and the subject many. Running parallel to that, the law in Foucault's thought became part of regulatory and regulating (disciplinary and biopolitical) mechanisms which share a normative content. Indirect legislation, be it civil, criminal or constitutional, or even economic, allows us to understand the utilitarist normativity within a biopolitical context beyond law in its strict sense. Biopolitics is therefore a set of mechanisms which govern the individual through norms, whether legal or extra-legal to such an extent that it is possible to speak of biopolitical norms.

Thirdly, the comparison between Bentham and Foucault highlights unsuspected links in the fields of ethics and economics. Nonetheless their thoughts in the field can neither be united under the concept of biopolitical ethics nor under that of biopolitical economics. In the Epilogue, language issues are back at the centre of Foucault's biopolitical endeavour. Even if the issue of normativity is not absent from considerations on language, as understood in Bentham's and Foucault's works, this book makes it possible to see the importance of language as an authority which has a creative force in its utility and in the recess of the dark workings of the mind.

The contemporary relevance of this book is underscored by the continuing efforts of French and English-language-speaking academics to articulate their visions of power in the light of Foucault's works. In doing so, they employ Foucaultian concepts adopted from the utilitarian tradition of Western political thought, which draw their source from Bentham among others. The present wealth of studies on Foucault and on the application of Foucaultian concepts is breathtaking. But Bentham's influence on contemporary concepts such as discipline, biopolitics and governmentality is little known. This source can be traced and, retrospectively, can challenge the meaning and scope of these very concepts. Ultimately, the following chapters provide the academic community with 'biopolitics with utility', which is to be read as the regulation of population, shaped by the utilitarian calculus of benefit/cost in all fields related to the management of life.

PART I: BIOPOLITICS OF INTERESTS

INTRODUCTION: FROM INTEREST TO NORMS

Bentham is widely acclaimed as the proponent of the principle of utility. Focusing on the biopolitics of interests, Part I suggests a study of pleasures and pains in Bentham and Foucault from the perspective of Bentham's theorization of the principle of utility. The relevance of such a perspective will appear increasingly justified as the chapters unfold, culminating in the final chapters on the relationship between economics in a liberal state and interests.

The principle of utility, as based on the concept of interests, is not without its contradictions. The aim of this introduction is to highlight these contradictions in order to circumscribe the framework of the debate on pleasures and pains in the following two chapters.

When Foucault refers to the principle of utility,[1] he does have Bentham in mind, but not solely. Indeed, Bentham did not invent the principle of utility.[2] Moreover, in Bentham's theory itself there are different expressions of the greatest happiness principle.[3] At the end of his life, Bentham realized that the previous wording implied a disregard for the welfare of a community[4] and so, in 1827, he changed the phrase 'the greatest happiness of the greatest number' into 'the greatest happiness principle'.[5]

The principle of utility first appeared in Bentham's *Fragment on Government* and was later systematically exposed in *An Introduction to the Principles of Morals and Legislation*. Utility is both a psychological and an ethical concept. The injunction to an *ought* is derived from the *is*: that is, all men should conform to the principle of utility because they do so in fact.[6] Of course, deriving an *ought* from an *is* is not without a certain number of difficulties, as explained in Chapter 5.[7] Bentham's psychology rests on the observation of human nature, rather than assumed *a priori*.[8] He borrowed his psychology from David Hartley, and never showed how it could be supported by observational science.[9] However, in prac-

tice, Bentham's ethical hedonism can be pursued without any commitment to his psychological hedonism.[10]

For the purpose of Part I, the most pressing question is: how the principle of utility is applied in practice? Only what Bentham calls the 'felicific calculus' can determine that an act is conformable to the principle of utility. One cannot add apples and pears. In order to add two items, they must be commensurate. Thus, to add different types of sensations in different individuals, at different times, Bentham identifies common values shared by all pleasures and pains: intensity, duration, certainty, uncertainty, propinquity and remoteness, fecundity and purity. The main issue of the utilitarian calculus is: can happiness, that is the superiority of pleasurable over painful sensations, be measurable? Can it be assessed in financial terms?[11] There are also problems of measuring the different kinds of pleasures[12] and different intensity of pleasures among individuals.[13] Moreover there is the diminishing marginal utility of money, which Bentham considers, but which varies from one individual to another.[14] In the end, neither value nor happiness can be calculated.[15]

If commentators from all ages have criticized Bentham for basing his ethics on hedonistic principles, the only moral good being pleasure, C.-F. Bahmueller rightly reminds the reader that Bentham's pleasure might not be our pleasure, at least not for all categories of people:

> so far from wallowing in 'pleasure' in the ordinary sense, life for the poor under the regime advocated by this philosopher of the pleasure principle was positively *ascetic*. The poor would be remade as models of the secularized Protestantism of the work ethic.[16]

Moreover it is important to keep in mind that interests are not pleasures and pains per se, and accounting for interests in terms of pleasures and pains also raises a certain number of problems.[17] Pleasure and pain are feelings. The varying intensity of those feelings will prompt individuals to act one way or another to increase their pleasure and diminish their pain. This intent is called interest.[18] As with pleasures and pains, Bentham does not define interest, as he thinks it is self-evident.[19]

Bentham does not wish to add pleasures and pains simply for their own sake, but because this sum will enable him to use utility as the foundation of a legal system and of an ethics. The principle of utility can explain how law is possible by explaining how punishments operate.

The following two chapters do not tackle the ingrained problems raised above related to Bentham's use of pleasures, pains and the utility calculus but their focus on the fecundity of the comparison of pleasures and pains in Bentham and Foucault. However, the shortcomings of utility as a principle have to be borne in mind throughout the following discussion.

In Chapter 1, the operation of pleasure in Bentham and Foucault is examined, and is followed by an exploration of the flaws within their arguments. Foucault, in his theorization of 'bodies and pleasures', refuses to set a framework for the operations of that specific type of pleasure and in doing so, undermines the validity of the concept. The only way to rescue his ideological crusade for 'resistance' is to use a minimal form of utilitarian calculus of interest to make his concept of 'pleasures' workable in a biopolitical environment. The combination of Foucault's 'pleasures' and Bentham's calculus is called 'biopolitical pleasure'.

Chapter 2 separates the study of pains from pleasures in an artificial way, as both are sensorial reactions to external stimuli, and as both are set on a continuum from the most intense form of pleasure to the most unbearable form of pain. Nonetheless, the division is guided by argumentative necessity. The relationship between Bentham and Foucault is inverted in the chapter: Bentham is no longer the one who lends his conceptual tools to make a Foucaultian concept workable. The chapter highlights the practical shortcomings in Bentham's pain. The force of Foucault's thought lies in balancing interest with instinct to account for unspeakable criminal acts. Instinct, a notion foreign to Bentham's time, helps to flesh out a concept of 'biopolitical pain'. Pleasures and pains are poised between *ought* and *is* statements, an imbalance which puts them on a scale from greater to lesser conformity to utility.

From what has been explained, the normative nature of the principle of utility is self-evident. It cannot be demonstrated and serves as a measuring rod for any personal and collective action, for any legal, moral or economic act. The utility principle is thus normative:

> the normative statement or principle – usually known as the principle of utility – can be summarized ... as the principle that every action should be judged right or wrong according to how far it tends to promote or damage the happiness of the community, or the happiness of those people whom the action affects.[20]

The normativity of utility is often stated by commentators.[21] Indeed, in the opening statement of *An Introduction to the Principles of Morals and Legislation*, the *ought* is read as normative.[22] However, the full implications of considering utility as a norm are not mapped. Through the investigation and comparison of the operations of pleasures and pains in Bentham and Foucault Part I will pave the way to tackling the issue of normativity in Part II.

1 BIOPOLITICAL PLEASURE

> [A] warning which, for the sake of the reader as well as for the sake of the writer, it is absolutely necessary to give is – that, unless the regard for human happiness has such an influence over his mind as, in pursuit of that object, to enable and force it to endure from beginning to end the extremity of disgust – disgust in its most repulsive form – he would do well to close the book at this very place, and not suffer his eyes to behold another syllable.[1]

Introduction

'Biopolitical pleasure' is the phrase used in this chapter to describe how pleasure operates in the biopolitical era. The phrase can be understood to mean either the way biopolitical mechanisms control sexual behaviour, or the strategies of resistance developed by individuals and groups to counter attempts to manage their bodies. Foucault explores both meanings in his writings on sexuality. He first deconstructs the way bodies, through discourse and *dispositif*,[2] are modelled to maximize productive aims in a biopolitical era. He then explores how individuals could fight back against biopolitical assaults by reclaiming their bodies through unmapped pleasures. Bentham's writings prefigure Foucaultian descriptions of and resistance to discourses on sex. By deconstructing legal discourses on sexual offences, he shows how pleasure should circulate in a State based on the rules of utility. I will argue that Foucault's 'pleasures', understood as resistance, are akin to Bentham's utilitarian sex.[3]

The issue of pleasures as a technique of resistance appears late in Foucault's works. It is first explored in *The History of Sexuality*:

> It is the agency of sex that we must break away from, if we aim – through a tactical reversal of the various mechanisms of sexuality – to counter the grips of power with the claims of bodies, pleasures and knowledges, in their multiplicity and their possibilities of resistance. The rallying point for the counterattack against the deployment of sexuality ought not to be sex-desire, but bodies and pleasures.[4]

Foucault purposely gives a sketchy meaning to his concept of 'bodies and pleasures', which is no more defined than in the above excerpt. In fact, he refuses to

define it, because doing so would limit and curtail the creativity of those wishing to explore new ways of producing pleasure and relationships with their bodies. He writes: 'the idea of a programme is dangerous. As soon as a programme is presented, it becomes a law, and there's a prohibition against inventing.'[5] However, and on account of his silence, the concept lacks weight and cannot be used as a wedge to drive into the grip of power.

Among many others, Nancy Fraser, points to this shortcoming when she writes:

> What, then, might body-language, better than the vocabulary of humanism, permit us to say or to do about such things? Here is where my capacity to imagine a plausible Foucaultian response runs out. I can form a non concrete picture of what resistance to the deployment of sexuality in the regime of bio-power in the name of the body and its pleasure would be like. Or to the extent that I can, it is one which, by the most ironic coincidences, resembles the hedonistic utilitarianism of the very architect of panopticism himself, Jeremy Bentham.[6]

Nancy Fraser associates the reversal of any form of disciplining and sexualizing of our bodies with Bentham's Panopticon. This 'panoptic' pleasure as resistance is to be found in sado-masochist practices. To a certain extent, this is a distortion of Nancy Fraser's statement. When she wrote her essay, Bentham's manuscripts on sex had not yet been published, so she could not envisage Bentham's contribution to the reflection on a resistance to sex beyond the Panopticon as an instance of sado-masochist pleasure. It is key to my present argument that she points to Bentham in order to understand Foucault's 'pleasures'. When the biopolitical body is associated with the Panopticon, the association is rarely flattering. However, Bentham's other writings on sex now throw a different light on what we could call biopolitical pleasure, which goes beyond the sado-masochist nature of a panoptic pleasure.

Generally speaking, pleasure is the cornerstone of Bentham's hedonistic utilitarianism – individual and collective actions must measure up to this universal standard. As Bentham clearly phrases it:

> It may be asked indeed, if pleasure is not a good, what is life good for, and what is the purpose of preserving it? But the most obvious and immediate consequences of a proposition may become invisible when a screen has been set before by the prejudices of false philosophy or the terrors of a false religion.[7]

Bentham's utilitarianism can be used to give meaning to concepts Foucault only sketched out. Bentham's thought allows one to connect the dots within Foucault's impressionistic concept. The resulting product will not be a deeper understanding of a concept of pleasures, which Foucault refused to define, but will give meaning to Foucault's pleasures within a biopolitical environment. Biopolitical pleasure is a new concept created from the meeting of two great

minds sharing a common stand on pleasure, and which could eventually become a political tool in today's world, one that would give a voice to Foucault's inarticulate cry for 'bodies and pleasures'.

In order to achieve this aim, this chapter will explore Foucault's and Bentham's works on sexuality. To what extent can Bentham contribute towards a definition of Foucault's concept of sexuality? How can Bentham help us to understand the concept of 'bodies and pleasures'? The answers to these questions are not self-evident. Indeed Foucault never read Bentham's writings on sex. Though Foucault did read Bentham's Panopticon writings[8] and was familiar with some of Bentham's economic[9] and constitutional writings,[10] he could not have read his works on sex since they were not available at the time he carried out his research. The only complete set of works by the philosopher to date is John Bowring's edition of the *Works of Jeremy Bentham* (1843).[11] Another more scientific and exhaustive edition is underway but fewer than half of the projected number of volumes have been published so far. The Bowring edition did not include his writings on sex, for example, since what Bentham wrote on the subject was hardly of a nature to favour publication at the time.[12]

This chapter will endeavour to draw parallels between, and highlight shortcomings in, the two theories. If Foucault's thought goes a step further than Bentham's on the social consequences of redefining 'pleasures', Bentham's insight into the limits to be given to any pleasure-seeking activity draws a line between what can and cannot be included in Foucault's pleasures. This first attempt at isolating the meaning of Foucault's pleasures' will lead to an assessment of the utilitarian pleasure-maximizing calculus as the only possible form of biopolitical pleasure.

Defining Sexuality and Pleasure

In his book on the subject, Joseph Bristow notes that sexuality is a term which first appeared in the *Oxford English Dictionary* in 1836 as 'the quality of being sexual or having sex'.[13] The term was coined in the wake of the works of sexologists. The term sex is ambiguous in that it points both to sexual activity and to the distinction between male and female anatomy. In Foucault's works, sexuality is first and foremost a cultural construct which describes the sexual behaviour of individuals. Foucault defines sexuality thus:

> Sexuality must not be thought as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a real surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.[14]

The body is at the heart of these practices. Foucault opposes 'sex-desire' to 'bodies and pleasures' in an attempt to escape society's control over our bodies – the way they feel, love and express themselves.

Bentham does not problematize sexuality and the term did not exist at the he was writing. However, his writings exemplify a keen sense of how discourse, pleasure and knowledge contribute to the shaping of certain rules regulating sexual behaviour.

For Foucault, there is more than the body at stake in human sexuality. The individual's identity springs from the sexual choices he or she makes or is forced to make. Foucault explains:

> Sexual behavior is not, as it is too often assumed, a superimposition of, on the one hand, desires that derive from natural instincts, and, on the other hand, of permissive or restrictive laws that tell us what we should or shouldn't do. Sexual behavior is more than that. It is also the consciousness one has of what one is doing, what one makes of the experience, and the value one attaches to it.[15]

Foucault conceives of sexuality as one of the agents which contribute to shaping individual consciousness.

Sexuality cannot be reduced to its reproductive function. Human beings engage in this activity on account of the pleasure they derive. The term pleasure is fraught with meaning in Bentham's utilitarian philosophy and in Foucault's writings on sexuality. Strangely enough, neither Bentham nor Foucault define pleasure. The concept is a keystone in the architecture of their respective philosophies but is not explained. The question 'What does it mean to feel pleasure?' or 'What do we experience when we feel pleasure?', remains unanswered throughout. Foucault has often been taken to task for having presented body-less and disincarnated individuals in his writings.[16] His inability to give depth to this concept is a good example of this. As for Bentham, he is accused of equating pleasure with money.[17] Pleasure remains the dark spot of their philosophies: it is that which cannot be described. This dark spot renders the task of the present chapter all the more arduous. Nonetheless, Bentham's and Foucault's pleasure can be circumscribed, even if it is not possible to describe its contents and workings.

Except in his writings on sex, Bentham deals with pleasure mainly in a non-sexual sense. Pleasure and pain are so universally prevalent and self-evident that they need not be defined. However, Bentham does delve into the minute details of different types of pleasures,[18] without describing the nature of the feeling experienced when one gets pleasure.

Pleasure is the original, indivisible sensation on which his whole system is based:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine

> what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: any effort we can make to throw off our subjection, will serve but to demonstrate and confirm it ... The *principle of utility* recognises this subjection, and assumes it for the foundation of that system.[19]

Foucault's work reveals a similar paradox. His book on sexuality describes discourses on sex without explaining what pleasures are. The closest one can get to a description is in the second volume of *The History of Sexuality*, where explicit reference to pleasure is made. Using volume two as a source, since it considers the use of pleasures as part of the way an individual elaborates the self as a moral subject, contains the danger of skewing the meaning of the term pleasure. In the following passage, Foucault states:

> The ethical question that was raised was not: which desires? which acts? which pleasures? but rather: with what force is one transported 'by the pleasures and desires'?[20]

Pleasure is presented as a force that transports an individual. The force of pleasure and desires can vary, but it is the force that manifests itself through transportation.

The concept of transportation is opposed to a trend in classical literature and in Christian theology which equates the sex act to an 'epileptic' form,[21] as Foucault calls it. The latter form, which Foucault does not consider appropriate to describe sexual intercourse, is exemplified in the words of Saint Augustine:

> This sexual act takes such a complete and passionate possession of the whole man, both physically and emotionally, that what results is the keenest of pleasures on the level of sensations, and at the crisis of excitement it practically paralyzes all power of deliberate thought.[22]

Far from the description above, Foucault's concept of pleasures shows the way in which individuals can experience pleasure beyond the norms society sets. In order to explain the nature of these pleasures, the extent of constraints on individual pleasure has to be highlighted, as well as deconstructed in order to pave the way for renewed forms of pleasure in a creative sexuality. The validity of the conclusions drawn will, of course, depend on the restricted *corpora* available to researchers at present.[23]

Foucault's Laboratories of Sexual Experimentation[24]

Foucault's thought on sexuality is divided into two strands. The first aims at deconstructing discourses on the sexual act and categories labelling individuals who perform those acts. As such, it highlights the cultural construct in discourses on sexuality. This approach is to be found in the first volume of *The History of Sexuality*. The second aims at reconstructing an alternative sexual behaviour.

Can one perform a sexual act without being predetermined by the norms society sets? The answer to this question is to be found in his study of Ancient Roman and Greek sexual practices in volumes two and three, as well as in his lecture series and interviews.[25]

The first volume of *The History of Sexuality* presents the initial preliminary stage where Foucault deconstructs discourses on sex. Foucault challenges the widespread interpretation which holds that sexuality has been repressed in Western societies. Grounding his study on historical data, Foucault proves that, contrary to shared beliefs, since the seventeenth century, there has been an increasing amount of discourse on sexuality.

Far from suppressing discourses on sexual behaviour, the Christian religious practice of confession and its non-religious derivative, psychoanalysis, feeds the discourse-producing industry. Foucault identifies two ways in which sex can be an object of analysis: by silence and by discourse. The former can be exemplified in the layout of buildings, which reinforces marital sex by the position of the bedroom in the home.[26] The latter, through the practice of confession, for example, displays an urge to talk about sex, as if sexuality did not exist unless it is confessed. Foucault writes:

> We have since become an extraordinarily confessing society. Confession has spread its effects far and wide: in the judicial system, in medicine, in pedagogy, in familial relations, in amorous relationships, in everyday life and in the most solemn rituals; crimes are confessed, sins are confessed, thoughts and desires are confessed, one's past and one's dreams are confessed, one's childhood is confessed; one's diseases and problems are confessed.[27]

Foucault proves how inadequate the repressive hypothesis is in accounting for historical changes in sexual behaviour over time.

Rather than being something natural or essential, Foucault shows that sexuality is a cultural construct. He does so by analysing how categories of sexual identity work as means of social regulation, and how discourse contributes to the construction of subjectivity. Foucault's enterprise at deconstructing discourses on sex rests on the hypothesis that naming a thing or a person is giving a thing or a person an identity. He contends that the process of categorizing individuals serves to regulate individuals. Ways in which individuals came into being, i.e. subjects, is an effect and not a cause of discourse. This subjectivization is an ongoing and constantly renewed process and as such, individuals' sexual behaviour becomes the locus of power. The building of sexual identities lies at the intersection of several elements, among which are: individual and collective representations of the body, sexual behaviour, clothing, the divide between public and private, the way in which one's identity is tagged by oneself and others and, of course, law and morality, being the legal and social norms society establishes.

Risk management is at the heart of the labelling and norm-setting enterprise which Foucault aims to deconstruct.[28] Foucault's works on sexuality stand at the crossroads of a theory of population (derived from demography) and a theory of the body (originating from physiology).[29] Because it entails a demographic perspective, Foucault's theory on sexuality cannot escape the tools demography uses to analyse its object, such as statistics to evaluate and manage risk. Sexual practices that increase population and decrease disease are promoted by institutions. Heterosexuality is thus encouraged over homosexuality, faithful monogamy above explorative successive polygamy. In order to guarantee the enforcement of this strategy, individuals are labelled according to their sexual behaviour. This also helps to assess the risks to society of certain practices. Labels are not neutral; words attached to some practices or individuals are a way to discredit them. Foucault gives an example of this perspective:

> Four figures emerged from this preoccupation with sex, which mounted throughout the nineteenth century ... the hysterical woman, the masturbating child, the Malthusian couple, and the perverse adult.[30]

Coining new words from identified sexual practices created sexual minorities,[31] a trend which also resulted in categories of people being barred from certain professions. In certain countries, homosexuals are not allowed to enlist in the army. Norms are thus set to enhance demographics,[32] encourage certain sexual practices and produce a healthy reproductive population.[33] Problematization, which operates in terms of a division between what is presented as normal and what as pathological, links the aspiration of an individual to be normal to the management of the population as a whole.[34]

In this first phase, Foucault deconstructs discourses on sexuality, which he categorises as hysteria, masturbation, homosexuality and birth-control techniques. In volume one of *The History of Sexuality* he suggests ways in which these deconstructed sexualities could be rebuilt and continuously recreated. He names this attempt 'bodies and pleasures'. The significance of this mysterious phrase is neither to be found in *The History of Sexuality*, nor in volume one nor in the subsequent volumes. Scholars in search of the meaning of 'pleasures' have to read between the lines of his later lectures and interviews.

The reason is not to be ascribed to a methodological shortcoming, but rather to a non-ideological stance. Foucault was brought up in an era in which Marxism, structuralism and psychoanalysis were the prevalent ideologies. He was distrustful of any programme, as he explains himself:

> I am wary of imposing my own views, or of setting down a plan, or program. I do not want to discourage invention, don't want gay people to stop feeling that it is up to them to adjust their own relationships by discovering what is appropriate in their situations.[35]

Nonetheless, Foucault does open up perspectives on how new forms of pleasure could be explored or, at least, gives examples of how they have indeed been explored.

Foucault understands 'bodies and pleasures' as forms of non-disciplinary eroticism:

> We must invent with the body, with its elements, surfaces, volumes, and thicknesses, a nondisciplinary eroticism – that of a body in a volatile and diffused state, with its chance encounters and unplanned pleasures.[36]

The body is at the centre of this new endeavour. As Foucault writes elsewhere: 'The idea is also to make use of every part of the body as a sexual instrument'.[37] Traditionally accepted sexual organs are not the only parts of the body whose potential for pleasure should be explored. In this, Foucault differs greatly in his definition of sexual pleasure from Bentham, who associated sexual pleasure with the performance of the sexual act through the medium of sexual parts.[38]

When Foucault speaks about sexualizing all parts of the body, he refers to sado-masochist practices, and more particularly the sado-masochist subculture he experienced in the San Francisco ghetto. His idea of 'bodies and pleasures' is of course shaped by this experience. He refers to the creative enterprise of the sado-masochist; however, he wishes to extend the particular sado-masochist experiment on bodies to all other forms of pleasures. These pleasures need not be sexual but they need to be pleasures experienced by bodies. 'Bodies and pleasures' is a plea for pleasure beyond the feeling procured by the mechanical rubbing of sexual organs. He writes:

> [The sado-masochist subculture] is the real creation of new possibilities of pleasure, which people had no idea about previously ... [people] are inventing new possibilities of pleasure with strange parts of their bodies. The possibility of using our bodies as a possible source of very numerous pleasures is something that is very important. For instance, if you look at the traditional construction of pleasure, you see that bodily pleasure, or pleasures of the flesh, are always drinking, eating, and fucking. And that seems to be the limit of the understanding of our body, our pleasures.[39]

These pleasures are not sought out for themselves. They entail a creative process of one's identity. One's personal identity, that is one's subjectivity, is a constructive process of both obedience and resistance to norms set by society. However, beyond this normative element, there is also a form of self-reflection on behaviour.[40] Whether governments foster[41] or forbid certain behaviours, they develop an array of self-subjecting technologies.[42] Interdictions also have constructive power, since they have created sexual identities and a multiplicity of sexualities that would not have existed otherwise. Since power circulates between bodies,[43] this enhances the possibilities of the body.[44] These technologies of power are part

of the government of others and of oneself, the latter being ways in which subjects come to an understanding of themselves; that is, how individuals could transform themselves by certain operations on their bodies, souls and conduct.[45] Foucault's study in sexuality is a reflection constitutive of the conduct of conducts.[46]

The way in which one experiences pleasure stands at the crossroads of these power relations, and at this very spot, individual subjectivity is in the unending and ever renewed process of becoming.[47] Redefining pleasure means shaping a new consciousness.

Exploring new forms of pleasures also has social consequences that reshape the way in which human relationships are formed beyond traditional procreative marriage bonds. As Foucault writes: 'with our desires, through our desires, go new forms of relationships'.[48] Gay relationships are central to this discussion. If these new relationships have sprung from homosexuality, they are in no sense to be limited to gay ghettos. Foucault's call is for all to experiment with different forms of pleasures and to let them reshape their relationships. These relationships do not conform to the ideas of relationships held by others, but they are nonetheless pleasurable and satisfying.[49]

Foucault gives a name to these relationships. He calls them friendships.[50] Not only because he is in want of a better word to describe a phenomenon which has never been mapped or authorized, but because it allows him to link these relationships to the tradition of same-sex friendships. These friendships refer to same-sex social intercourse homosociality. However social bonds with persons of the same sex can become homoeroticism.[51] Foucault recalls his feelings towards homoeroticism and writes: 'As far back as I remember, to want guys was to want relations with guys. That has always been important for me. Not necessarily in the form of a couple but as a matter of existence.'[52] Beyond the enduring stereotype of men living with men disguised as women, Foucault reasserts the homosexual's desire for masculinity when he writes:

> But I think in the schema of a man affirming himself as a man, there is a movement towards redefining the monosexual relation. It consists of saying, 'Yes, we spend our time with men, we have mustaches, and we kiss each other', without one of the partners having to play the nelly or the effeminate, fragile boy.[53]

Areas in the public sphere have always been open to homoeroticism: government bureaucracy, old boys' networks, army barracks, all-boy boarding schools, etc. There is a fine line between experiences of male bonding and same-sex desire. Foucault recognizes that in the trenches men were not necessarily having sex with each other, but their lives together created strong emotional relations:

> One can wonder how, in these absurd and grotesque wars and infernal massacres, the men managed to hold on in spite of everything. Through some emotional fabric, no doubt. I do not mean that it was because they were each other's lovers that they con-

> tinued to fight: but honor, courage, not losing face, sacrifice, leaving the trench with the captain – all that implied a very intense emotional tie.[54]

Foucault wanted to explore the history of friendships,[55] but unfortunately his untimely death prevented him from doing so. Once again, what we are left with is a sketchy outline of how friendship would allow pleasures and relationships to challenge the norms society sets.

This friendship among men, or among women, unsettles the groundwork of society. It allows for the formation of new alliances that carry with them emotional, economic and social implications,[56] hence creating new 'lines of force'.[57]

Foucault's description of sexuality moves from deconstructing discourses on sex to opening up new perspectives on new forms of bodily pleasure and innovative forms of social relationships. However, the theorization of Foucault's concept of 'bodies and pleasures' also raises some unresolved issues. Thanks to the input of Bentham's utilitarian hedonism, it may be possible to find a resolution to these contradictions.

Bentham and Utilitarian Sex

Bentham is a utilitarian, and his perspective on sex[58] is informed by his belief that the aim of government is to maximize pleasure and minimize pain.[59] Study of sex is fascinating in that it does away with any prior moral preconceptions and only envisages the issue from the point of view of pleasures and pains: 'Of the present enquiry the sole objects are general utility – or the maximum of human happiness[60] – and in so far as conducive to that object, the truth of things or, in one word, useful truth'.[61] This is, of course, consistent with Bentham's overall method and not specific to his writings on sex.

Sex is a choice issue when it comes to pleasures. It is an activity which produces pleasure for people who participate in it. However, as Foucault pointedly remarked, it is also a very contentious issue as it is a subject which is fraught with taboos and regulated by strict norms set by society, institutions, communities and religion.[62]

Bentham is aware of the difficulties attendant on tackling such a subject when he writes: 'The veil which the law of delicacy throws over the subject in question must from the very first entrance upon it be compleatly drawn aside'.[63]

Bentham's first concern in his 1814–6 writings is to warn readers of the nonconformist nature of his inquiries into such a sensitive issue as that of human sexuality. His second chapter – and this is of special interest in our comparison of Bentham and Foucault – opens with the issue of norms. Bentham does not use the term 'norm', but rather describes the opposition between modes of being as 'regular' and 'irregular'. He explains:

> By regularly is meant in a manner conformable to rule: viz. the rule prescribed by public opinion in the community to which the party belongs: by irregularity in a manner unconformable to that same rule. This rule, then, what is it? it can be no other than that which has been derived from the observation of the mode of thinking which, on the part of members in general, has most extensively had place.[64]

Any attempt to adopt a moral or normative behaviour is undermined by this preliminary statement. Any eulogistic statement is based on conformity to rules adopted by a community, and any dyslogistic statement[65] on nonconformity to the same rules. These rules are not presented as right, true, moral, prescribed by religion, utilitarian or rational; they are presented as norms only because they originate from customary practice in a community.

Bentham identifies nine cases of irregular or abnormal sexual behaviour which he names: (1) Solitary act; (2) Act between two persons of different sex but not married; (3) Act between two persons of different sex, one of whom is married; (4) Act between two persons of different sex and under legal age; (5) Act using an organ which is not susceptible of impregnation; (6) Act involving two or more males; (7) Act involving two or more females; (8) Act involving an animal; and (9) One of the bodies is dead.[66]

It is interesting to note that Bentham does not use the following dyslogistical terms currently in use to describe these acts: (1) Masturbation; (2) Pre-marital sex; (3) Extra-marital sex or adultery; (4) Sex with a minor; (5) Sodomy;[67] Fellatio etc.; (6) Gay sex;[68] (7) Lesbian sex;[69] (8) Zoophilia; and (9) Necrophilia. However, he does add to his description the legal punishment attached to the commission of the said sexual acts.

Bentham's method consists in describing the acts – with the punishment annexed[70] – without attaching any ethical judgement encapsulated in the terms generally used to describe the said acts. Indeed, the term adultery, for example, carries heavy moral and religious connotations which are very negative. The reason lies in the fact that, according to Bentham, the only true ethical stand one can take is utilitarian, i.e. based on the increase in aggregate pleasure and decrease in aggregate pain:

> for a division drawn from an ethical source. Under the principle of utility there can be but one such source, viz. the effect of the operation on the sum of happiness – the operation is preponderantly noxious or it is not.[71]

In his assessment of the morality or criminal nature of the act, Bentham uses several criteria. As morals and legislation find their source in utility,[72] understandably, when it comes to sexual practice, Bentham does not distinguish morality from the need to legislate. The assessment of the morality of the act is therefore based on a careful analysis of the ratio of the pleasure the act undoubtedly produces for the person who engages in it[73] and the pain it may cause to that

same individual in the long term, to his/her partner and/or to the community. Grounds for what Bentham calls the 'noxiousness' of the act, what others would call the utilitarian morality, or what we choose to call the benefit of pleasure over pain, are assessed as injury to health, loss of reputation and absence of consent.[74] In the first two instances, Bentham does not think legislators have a case to intervene and legislate against such practices.

Indeed, when it comes to criminalizing behaviour, Bentham demonstrates the inconsistencies of the laws of England of his time: for example, although male homosexual sex was severely punished, lesbian sex escaped any mention in statute or case law.[75] The English people even seemed to consider any sexual act performed between two consenting male adults more severely than rape or adultery.[76] This gross inconsistency in the way public opinion reacts to the performance of certain sexual acts shows, retrospectively, that the concepts of regular and irregular as defined by the community are unreliable. Bentham traces the origins of inconsistency in public opinion as regards certain sexual acts to the eligibility of the sacrifice of pleasure[77] in the eyes of the Deity,[78] and in the passions of antipathy,[79] envy[80] and malevolence.[81] Bentham's stand is what would now be called relativist.[82] Every man's pleasure is just as good as any other's:

> The man to whom habit has rendered the use of tobacco a source of gratification, whether in the way of snuffing, smoking or mastication, by nothing that any one can say to him will he be convinced that that taste of his is a bad taste. Let him see that by taking it he inflicts annoyance on those in whose presence he is taking it, you may make him abstain from it, but never can you can not make him [*sic*] in his own mind acknowledge it to be a bad taste.[83]

Irregular sexual acts, i.e. immoral ones, are generally reported to create some mischief, which is the basis for legislating against them, on the following grounds: (1) Injury to population;[84] (2) Injury to health;[85] (3) Indifference to the opposite sex.[86] Only on these grounds could these acts be banned and punished. However, Bentham proves these fears to be unfounded. He goes further in his objection to the mischief of irregular sexual behaviour when he states that fornication with a man causes less evil than with a woman, on account of the evils of loss of virginity, pregnancy, prostitution, disease, etc. attendant on the performance of the sexual act outside the bonds of marriage between a man and a woman. The sexual act between two men or two women is not accompanied by the same mischief.[87] Bentham identifies three forms of mischief arising from sexual intercourse between males: (1) Decrease in interest in females;[88] (2) Danger of seduction by teachers; (3) Annoyance of seeing and hearing love-making. All of the three evils produce only imaginary mischief, as classical literature established that males attracted by males turn to sexual intercourse with the opposite

sex at the age of 20,[89] a loving teacher can inspire the improvement of the pupil's mind[90] and decency will shield these acts from the eyes and ears of neighbours.[91]

Indeed, there are no grounds to punish the aforementioned acts in a utilitarian society. Bentham recognizes three grounds on which punishment is admissible: (1) When an act causes a primary mischief; (2) When an act causes a secondary mischief in the shape of raising alarm among members of the community; (3) When an act causes a danger of emulation. Irregular sexual practices do not fall within any of these categories. They do not create mischief, but pleasure in the case of sexual intercourse between two consenting adults; they do not spread fear of such attacks, because there are none which are unrequited; and they do not create any danger of emulation.[92]

Punishment is useless in the following two cases:

> It will not be right to employ any punishment, 1. If the mischief resulting from the punishment be equal or superior to the mischief of the offence, nor 2. If there be any means of compassing the same end without the expense of punishment.[93]

Bentham also notes that the existence of punishment for an offence which is, at best, very difficult to prove between consenting adults, is liable to be used as an instance of malevolence and to trigger false prosecutions.[94]

According to utilitarian morality, there are only two ways of increasing human happiness, i.e. of ensuring the reign of utilitarian morals: first, diminishing the aggregate quantity of pain, and second, removing obstacles to the enjoyment of pleasure. Bentham states:

> Remains, therefore, two sources, and no more than two, from which the sum of happiness taken in all its shapes can receive encrease: one is diminution of the mass of pains; the other is removal of the obstacles which error and prejudice have opposed to the encrease of that stock of pleasures which every person has in his and her power.[95]

Among instances of human activity which produce pleasure, sexual activity ranks first. Bentham reaffirms that irregular sexual acts create pleasure and punishing[96] them creates mischief:

> Irregular – unnatural – call them by what names of reproach you will, in these innoxious gratifications taken in themselves nothing but good – pure good, if pleasure without pain be pure (mischief from excess being supposed out of the case) – will be to be found. But if the act be pure good, punishment for whatsoever purpose, from whatsoever source, under whatsoever name, in which so ever shape and in whatsoever degree applied in consideration of it, will be not only evil, but so much pure evil.[97]

If the removal of pain originating from physical sources is the realm of the doctor, to the legislator falls the task of removing obstacles impeding the full enjoyment of any sexual act, be it regular or irregular. Bentham's judicial activ-

ism does not extend to the creation of new offences, but rather to the removal of existing offences for certain types of sexual activities which are unpalatable to certain members of the community:[98]

> By the removal of that cloud of prejudice by which this part of the field of morals has to this time been obscured, what calculation shall comprize the aggregate mass of pleasure that may be brought into existence – the value of the services that may be rendered to mankind – in a word, the mass of good that may be done?[99]

The rationale of such a proposal rests not only on the error and prejudice on which these obstacles to enjoyment are founded, but also on the egalitarian nature of such pleasures. By de-criminalizing irregular sex acts, the happiness of the rich as well as that of the poor is increased.[100]

Bentham and Foucault on Sex

Bentham's overall endeavour is striking in its modernity, its unimpassioned treatment of such a contentious issue, and in the logical consequences drawn from a strict application of the principle of the greatest happiness for the greatest number. However, contemporary readers will not fail to notice the flaws in his analysis. Some rest on the imperfect state of knowledge at the time he was writing, for example in the case of the evils of masturbation,[101] and the decay of female (and not male) prostitutes and so on. Others arise from prejudice against sex with the female sex.

Let us start with the second reason and end with the first. The very phallocentric analysis Bentham produces needs to be accounted for. Historiography has portrayed Bentham as a champion of women's rights (right to vote, rights within marriage, etc.).[102] Indeed, in his writings on sex, Bentham challenges the established heterosexual monogamy by opening up the market for male sex to men and women alike.[103] So from a utilitarian perspective, sex with the opposite sex should be protected only on account of its contribution to population increase. However, his opinions are not devoid of prejudice against sex with females. Bentham writes a fascinating essay on the groundless prejudices against irregular sex, but he does not show women's virtue as a cultural construct.[104] Sex between people of the same sex is justified on the grounds that it does not create as much mischief as sex between unmarried males and females (loss of virginity, illegitimate offspring, prostitution, banishment),[105] without questioning the rationale of such mischief, which falls so heavily on women's lot. Both Bentham and Foucault would have fallen foul of feminists for their phallocentric views of sexuality. Indeed Foucault has already been criticized for his lack of interest in and empathy for women's feelings.[106]

Bentham's position in favour of decriminalizing sex with boys requires an explanation. A better understanding of the psychological mechanism which

triggers desire and which accompanies the performance of the sexual act might have enabled Bentham to avoid undue praise of male paedophilia, which is now outlawed in Western democracies.[107] Bentham seems also to forget that sex is enmeshed in power. Foucault's input into Bentham's analysis could have been of interest, had it been the purpose of this chapter.

Rather, what we are interested in here is to establish the grounds of comparison between the authors. Bentham and Foucault share a common interest in sexual perversions, which Bentham calls irregularities – more particularly homosexuality and masturbation. Indirectly, Bentham also tackles the issue of non-reproductive sex in married couples. While Foucault's focus is on the rise of new typologies in nineteenth-century society, Bentham is interested in all forms of regular and non-regular sexual practices, criminalized or not.

The use of the term 'perversion' to define their common endeavour requires an explanation, especially as 'pervert' is not a denomination Bentham and Foucault would have subscribed to. Bentham purposely avoided it, while Foucault showed that the pervert was a category. It was one of the ways in which scientists identified a type of behaviour and transformed it into a species. The term points to an example of the use of language which Bentham and Foucault were aware of and criticized, and part of the main common ground of the two writers is their redefinition of sexual crimes and norms through language; as a tool to deconstruct discourses, in Foucault's case, or as a tool for rebuilding categories, in Bentham's.

Bentham's project is grounded on a redefinition of sexual categories and his striking study on the rationale of legislating human sex is only made possible because he leaves behind Judeo-Christian morality, which he names the principle of asceticism. In order to distance himself from these traditional ethical principles, he refuses to use the terms commonly ascribed to these sexual practices (i.e. adultery, sodomy) on the grounds that they are disparaging, and thus create a backdrop of prejudice and impede any new thought on the subject. Using the term 'sodomy' as a starting point of an inquiry is to deal with a word which carries very heavy negative connotations from the outset. This skews the whole argument. Speaking of 'sex between men', on the other hand, is a way of describing the act without burdening the inquiry with unwanted prejudices. From these healthy linguistic foundations, the inquiry can then be based on new morals, and legislation can be built on the logic of the principle of utility.[108]

Language is also at the core of Foucault's study on human sex. *The History of Sexuality* is a misnomer in the sense that Foucault does not deal so much with histories of human sexual practice as with the discourses on these sexual practices. Bentham and Foucault display a shared concern in language used to describe sexual behaviour, and in the role of language and institutions (law, psychiatry, army, school, science etc.) in shaping acceptable and non-acceptable practices according to norms defined by the same institutions and society. Their perspec-

tives on their objects are nonetheless different. It is inductive on Bentham's side and deductive on Foucault's. Bentham deals with what he calls the act (i.e. the sexual act); Foucault explores the birth of the concept of sexuality as the product of discourse. Bentham refuses to use the terms current in his time on account of the consequent distortion of any analysis these terms entail. Foucault takes a term in use and analyses the networks of power and the birth and development of discourses produced by power.

The main difference between Bentham and Foucault lies in the issue of repression. The reasons they assign to the criminalization of sexual behaviour are different: for Bentham it is asceticism, which should be overruled by the principle of utility; whereas for Foucault, it is misleading to talk about asceticism,[109] since sex has always been the object of increasing discourse. Bentham seems to be mistaken in that he subscribes to the theory of repression, which Foucault criticizes.

The concept of repression highlights a negative view of power,[110] but Foucault sees the operations of power on sex as not only negative,[111] since power produces identities,[112] pleasures[113] and resistance.[114] Power can be defined as the multiplicity of force relations immanent in the sphere in which they operate.[115] The question is whether Bentham shares this view of a positive effect of power. He does not deal with this issue in his works; however, we can infer an answer from his writings. Bentham wants to create a society governed by the rules of utility, one in which individuals would first conform reluctantly and then internalise the utilitarian ethos. In Bentham, operations of power do not only forbid or allow certain types of behaviour, but also have the effect of changing the way people think. However, the comparison stops here, since resistance is a touchy issue in a world order based on the only possible truth – that is, utility. According to Bentham, people resisting this order are either blind men walking in the dark who need to be enlightened by the beauty of utility, or individuals who pose a threat to the happiness of the community at large.[116]

This raises the question as to whether or not Bentham participates in the sexual discourse industry Foucault criticizes as an instance of a general endeavour to control people's sexuality. I do not think so. Bentham wants to cast the field of consensual sex outside the realm of social control (be it through moral or political sanction). Bentham could have made his own Foucault's plea for 'bodies and pleasures'.[117]

Biopolitical Pleasure

Population control implies the management of wealth, the monitoring of labour capacity and the need to strike an adequate balance between growth and resources. Thus, when governments address the issue of population, they can-

not avoid trying to control human sexuality, to render it healthy, productive and norm-compliant. The future of any society is at stake when human beings engage in sexual activity. Sex is a highly biopolitical issue. Biopolitics was defined in the introduction to this book as the means of government that regulates the population in all aspects of human life:

> Biopolitics should be understood as the phenomenon whereby the individual and collective life of human populations, or even of human species, becomes an explicit object of practices of government.[118]

Foucault's concept of 'bodies and pleasures', notwithstanding the examples and development of what friendships are, lacks what is necessary to be operative in a biopolitical world. Because Foucault refused to define what he means by his concept, he was led to make unsubstantiated and thus contradictory statements. One instance of this is when Foucault tackles the issue of 'pleasures'. When pressed by reporters in his interviews, Foucault tried to explain what 'bodies and pleasures' could mean:

> there is the question of freedom of sexual choice which must be faced. I say 'freedom of sexual choice' and not 'freedom of sexual acts' because there are sexual acts like rape which should not be permitted whether they involve a man or a woman or two men.[119]

Foucault drew a distinction between freedom of sexual choice and freedom of sexual acts in order to determine which sexual acts will be permitted or not. Will sodomy be allowed? What about sado-masochism? Where does one draw the line between acts that are authorized and acts that are not? What is the rationale for excluding rape? If rape be excluded, why not sado-masochism? Is the issue of consent of parties the crux of the matter? How should one consider moments in sado-masochist sessions when consent is withdrawn? Is it when those practices become forbidden? What about sex with underage individuals? Can minors be allowed to give their consent to certain acts? Can their consent not be vitiated by their age? Foucault does not give any theoretical tools to settle these questions. The issue of consent, which seems to be implied but not developed in the distinction between acts and choice, does not establish a clear rationale of authorized and unauthorized acts.

More unsettling is that Foucault breaches the promise he made to leave his concept open to all forms of creativity. Through his ill-chosen distinction he delineates the borders of acceptable and unacceptable forms of 'pleasures', thereby restricting the scope of the concept.

Bentham's thought on sexual pleasure could help Foucault circumscribe the meaning of 'bodies and pleasures' without constraining its experimental potential. As such, the concept of 'biopolitical pleasure' finally emerges.

Bentham builds his own philosophy on pleasures. All individuals are equal when it comes to the assessment of the value of their pleasure or pain compared to those of other individuals. Utility will forbid the commission of any act that produces an excess of pain over pleasures. However, and this is central to the argument here, a given pleasure is not equal to a given pain. An individual will be denied all enjoyment if it creates an equivalent or greater degree of pain. Pain is always superior to any pleasure in the aggregate calculus of quantities of pain and pleasure.

Foucault's example can now be examined in a utilitarian perspective. Rape will be forbidden, not because of absence of consent nor on account of freedom to act, but because, although it produces an intense form of pleasure for the rapist, it creates much greater quantities of pain to the person subjected to non-consensual sex. This utilitarian rationale can now be applied to all forms of 'pleasures'. Any opposite-sex or same-sex partner, under-age partner, or animal for whom the amount of pleasure, when engaging in sexual intercourse, exceeds the pain experienced can engage in the sexual act, whatever the part of the body involved in the activity. On this principle, Bentham also allows individuals to have non-consensual sexual intercourse with dead bodies, since the individual engaging in the sexual act derives pleasure from it, and the dead person does not feel any pain.

Bentham provides a thorough rationale to circumscribe the limits of acceptable and unacceptable pleasures. It allows Foucault's concept to operate fully in biopolitical societies. The emerging picture is not that of Foucault's 'bodies and pleasure', since the rationale is not derived from Foucault but from Bentham.

The consequences of a utilitarian interpretation of Foucault need to be assessed. The rationale for the delineation of pleasures is the utilitarian calculus. Acceptability of any behaviour is assessed by comparing individual and aggregate quantities of pleasure and pain produced. This hedonistic calculus is at the heart of the principle defining what can or cannot be included in 'bodies and pleasures'. A way of allowing Foucault's 'bodies and pleasures' principle to operate efficiently in a community is to apply Bentham's calculus. When operating along these lines, Foucault's 'pleasures' become what can be called biopolitical pleasure. Biopolitical pleasure is any form of pleasure, whether sexual or not, experienced by anybody, as long as that pleasure does not create pain equal to or greater than the pleasure produced by the act. Biopolitical pleasure rests on the utilitarian calculus, whereas Foucault's unelaborated pleasures did not.

If risk is implied in the way society sets sexual norms for individuals and labels those who deviate from those norms, what is its impact on the resistance mechanisms Foucault explores in his concept of 'bodies and pleasures'? When Foucault opens up the perspective of resistance to society's control over our bodies, he wishes to exemplify that, beyond deterministic theories of which Marxism and psychoanalysis are examples, individuals are freer than they think they are.[120] Can deterministic tools such as statistics and risk management have

a part to play in forms of resistance to those very tools? If resistance to sexual norms cannot exist without a utilitarian calculus, can this calculus operate without statistics, with a view to limiting risks to individuals and society? How can this cost/benefit assessment be carried out rationally, if it is not backed by an array of statistics which provide information on risk-prone behaviour? How free can individuals be in society?

Foucault and Bentham deconstructed the way in which sexuality is controlled by norms, and supported by a system of moral rules, customs and laws. However, they could not escape the fact that any resistance to these norms could not operate without rules regulating these forms of resistance and the boundaries within which they were expressed. As Foucault so aptly put it: 'There is no question that a society without restrictions is inconceivable'. 'Bodies and pleasures' are bound by the same rule. They are limited in their workings by the cost/benefit calculus, the universal ethical standard in our biopolitical world. This standard is grounded on statistical evaluation and risk assessment.

Conclusion

In Foucault's view, sex comes first in the biopolitical mechanisms of population control. Moreover, sex stands at the intersection of individual conduct and the population control. Although Foucault does not realize it, he and Bentham share a common preference for de-criminalizing certain sexual acts. Central to the issue of de-criminalizing some kinds of sex is the use of neutral terms to name sexual activities as opposed to the eulogistic and dyslogistic terminology currently in use. Foucault's first volume of *The History of Sexuality* is an extensive study of the reasons why certain forms of sexual activities were promoted and others criminalized, language being central to this investigation. Far from traditional forms of control – such as censorship – naming is a new means of gaining power over others. Though Foucault's focus centres on why individuals are defined as norm-compliant or norm-deviant, the coining of terms describing sexual behaviour is at the core of the invention of these norms. Here, Bentham's reflection on the continuum of sexual practices sheds a different light on Foucault's subsequent writings on sexual behaviour after *The History of Sexuality*. Modern strategies of control circulate knowledge on sex in order to better control human sexual behaviour. For both writers, transparency in the language of law allows for a reconsideration of which sexual acts should be punished and how society deals with sexual behaviour.

Against all the odds, Foucault's concept of 'bodies and pleasure', as the creative potential of sex beyond norms, does not escape the need to define the areas of acceptable sexual behaviour. The reason lies in the nature of sex, which involves mind, bodies, power and reproduction.[121] The concept of 'bodies and pleasures' cannot operate beyond the pale, as Foucault would have wished.

Thanks to the input of Bentham's theories on sex, it is possible to conceive of something referred to as biopolitical pleasure in this chapter. This concept uses Foucault's 'bodies and pleasures' and makes it possible to see how his project of creative sexuality could reasonably operate in our contemporary society. In order to do so, this chapter has highlighted the fact that risk management can be read into Foucault's sexual normativity. Because sexuality is closely linked to reproduction, governments have tried to control it to foster healthy and productive sexual behaviour. This control can only be carried out through the assessment of the risk posed by certain types of sexual behaviour, in order to devise policies to limit risky acts. The cost/benefit calculus appears in the making of these policies. Foucault clearly explained that sexuality was controlled in a biopolitical world. However, what he did not see was that even pleasure, which tries to explore unmapped sexual territories, cannot escape utilitarian control.

Contemporary societies have shown how policies are introduced to try to influence the way people seek pleasure. Aids policy is a fitting example of biocontrol, which shows the ways in which governments want to change how people have sex (called 'safe sex'), rather than with whom or where they have sex, and has given governments the opportunity to modify the management of 'normal' and 'deviant' sexual behaviour alike. However, in the present biopolitical era, efforts are now geared towards warning people of the risks and publicizing the steps to avoid infection (such as the use of condoms and free HIV screening tests) rather than advocating different sexual practices.[122] These policies exemplify the concept of biopolitical pleasure, which controls the performance of sexual acts, without forbidding creative sexuality.

The bio-regulation of the population cannot but be shaped by the utilitarian calculus of cost/benefit in all fields related to the management of life. The biopolitical control of people's bodies is thus utilitarian in spirit. It has been shown that in the unsuspected area of resistance to biopolitical control, which Foucault names 'bodies and pleasures', pleasures are also subjected to individual and State-calculus to ensure the maximization of the population's well-being. The following chapter considers the operations of the utilitarian calculus in the field of crime control.

2 BIOPOLITICAL PAIN

> The notion of instinct enables the legal scandal of a crime without interest or motive, and consequently an unpunishable crime, to be reduced to intelligible terms.[1]

> Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate.[2]

From Utilitarian to Biopolitical Pain

Pain in Foucault

Unlike pleasures, which were not defined but which constituted a pivotal concept in Foucault's theory on sex, pain is not paramount in Foucault's thought. It does, however, need to be analysed. Having said this, I should point out that I am excluding pain which arises from sado-masochist practice since this type of pain, which produces some form of pleasure, falls within the first category of pleasures developped in the previous chapter. Foucault was interested in a wide range of pains: the pain caused by illness and the ways in which the medical professions accounted for this it;[3] the pain produced by religious rule and asceticism;[4] and the pain inflicted by public opinion on those who deviated from an established norm, especially in respect to nineteenth-century perverts.[5] However, my discussion will mainly centre on two types of pain which I will not necessarily distinguish. The first is the pain produced by the commission of an offence on the victims, their relatives and the community as a whole. The second is the pain inflicted on the offender as part of the punishment ordered by the sovereign or his or her deputies, which is the political source of pain. The assumption is that the debate between Bentham and Foucault rages on this particular issue.

My discussion originates in Foucault's treatment of pain in *Discipline and Punish*, a book which begins with a very graphic description of Damien being tortured. The fate of Damien on the scaffold sums up the infliction of pain, in the era of sovereignty, as part of a political sanction, in this case the attempted murder of the King of France:

> the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds ... [T]he excessive pain made him utter horrible cries.[6]

The opening graphic description does not exemplify how Foucault deals with pain in *Discipline and Punish*. The only other instance where pain is thus described is when Foucault details the shift from the chain-gang[7] to the police carriage, which he calls a panoptic carriage.[8] The reason lies in Foucault's tactics. His aim is not to dwell on pain as inflicted in the era of sovereignty, but to use these descriptions to highlight the shift from punishment in the era of sovereignty to punishment in the disciplinary era, represented by Bentham's ordered Panopticon.

In the era of disciplines, which is exemplified by the Panopticon in the eighteenth and nineteenth centuries, the term 'pain' is no longer used by Foucault. However we should not be misled by this semantic shift: Foucault is indeed dealing with pain inflicted by a political sanction, although it is no longer ordered by the sovereign but meted out in institutions (schools, army barracks, prisons, factories etc.).

At a first level, *Discipline and Punish* traces the shift from an old theory of punishment in the era of sovereignty, as represented by Damien's torture and the figure of the scaffold, to the new tactics of punishment in the era of discipline, as exemplified in Bentham's Panopticon. At a second level, Foucault shows the shift from penology ordered around the law to penology shaped by norms. Foucault repeatedly mentions that his historical sequences, which he names era, are not sequential but conjoint. For him, there still are signs of torture on the scaffold in the modern prison, where the body, as well as the soul, is the object of punishment.[9] In the same way torture itself had always included one of the utilitarian features, which will be developed below. Indeed, beyond its ritualistic and spectacular aspect, torture can be measured exactly, according to a principle Foucault names the 'quantitative art of pain'.[10]

The quantitative art of pain, which is studied in Foucault's discussion of torture, was improved on the new utilitarian rationale of punishment which first appeared in the eighteenth century with the works of Bentham, and also Beccaria.[11] This new art of pain goes beyond the counting of the number of lashes on the criminal's body according to his social status, to organizing pain rationally and economically. The question is no longer what quantity of pain should be inflicted on the criminal and what rituals will accompany his punishment to guarantee its exemplarity but rather, in Foucault's words: 'Ought such a crime to

be punished? According to what calculation? Of what use could its punishment be in the economy of the power to punish?'[12]

The new economy of punishment, that is, the new principles according to which pain will be applied to criminals by legal powers, satisfies six criteria. It should follow the rules of minimum quantity, sufficient ideality, lateral effect, perfect certainty, common truth and optimal specification. These rules imply that the criminal should not be punished more than is necessary; that it is the idea of pain, rather than pain itself, which is sought by the judge; that the object of the punishment is the other potential offenders, rather than the criminal himself (unless the criminal has the propensity to reoffend); that royal pardons should be abolished to guarantee certainty of punishment for crimes, and that the police[13] and their powers of surveillance should work alongside the justice system; and that offences must be defined and classified.[14] In the age of Enlightenment, many penal reformers advocated these ideas all around Europe, among whom were Beccaria and Brissot.[15]

This new penal theory was then superseded, or rather rendered more efficient, by the disciplines which borrow their principles from it, but reinforce its implementation by allowing a closer control of individuals. More than a penal theory, it is a technique of penal power, which is to be found in the Panopticon devised by Bentham. Bentham's Panopticon is well known and its detailed workings are explained elsewhere.[16] The Panopticon is the name given to a round building with a central tower from which an inspector can supervise the activities of inmates in the building, in which 1,000 workers, criminals, paupers, pupils or even – with some changes – ministers are housed. This 'idea in architecture',[17] as Bentham calls it, enables multiplication of the powers of punishment and individualizes the allocation of pain, and is a small-size experiment in penology. Foucault writes: 'At the heart of all disciplinary mechanisms functions a small penal mechanism'.[18] The powers at work in a Panopticon aim at ensuring norm-compliance by individuals: this power is called discipline. Foucault identifies the disciplinary mechanisms at work in the Panopticon as panopticism, which he defines as: 'the name given to the type of power where everything the individual does is exposed to the gaze of an observer who watches ... without anyone being able to see him'.[19] Disciplinary pain targets the individual. Pain is not an end but a means to an end, which is to take hold of the body and soul of the individual and remodel it according to the norms society sets.

The aim of the disciplines is to control individuals through the measured organization of their individual bodies. Discipline applies to all closed institutions, not only the Panopticon, as Foucault notes about military exercise:

> discipline creates out of the bodies it controls four types of individuality, or rather an individuality which is endowed with four characteristics: it is cellular (by the play of spatial distribution), it is organic (by the coding of activities), it is genetic (by the accumulation of time), it is combinatory (by the composition of forces). And, in doing so, it operates four great techniques: it draws up tables; it prescribes movements; it imposes exercises; lastly, in order to obtain the combination of forces, it arranges 'tactics'. Tactics, the art of constructing, with located bodies, coded activities and trained aptitudes, mechanisms in which the product of the various forces is increased by their calculated combination are no doubt the highest form of disciplinary practice.[20]

These exercises are not achieved without producing pain, albeit less intense pain than that of Damien on the scaffold. Why do the operations carried out in the Panopticon produce pain? They produce pain because their aim is to correct. Any correction, i.e. making the individual behave in a different way, is going to produce pain, at first at least. But the type of correction meted out by disciplines is far more subtle than the old 'hung, drawn and quartered' punishment. It is a micro-punishment. Each instance of micro-punishment is insignificant as such, but it is the continuous process of punishment the individual is exposed to which constitutes the unending pain disciplines impose upon individuals in order to reform them.

Forcing the individual to conform to strict rules of behaviour, of exercising his body in specific ways, of allocating his time in an ordered manner, causes pain to the person who has to submit to such discipline. In order to discipline individuals, power needs to create a specific environment in order to operate. It partitions individuals vertically and horizontally.[21] Inmates are no longer considered as a mass but as individuals. But at the same time exercises organize individuals into units. In the Panopticon, Bentham allocates individuals to classes, based on their productive abilities,[22] their corruptive tendencies and their sexual reproductivity.[23] He also partitions the day, week and year of the inmates into time-units, which are used for the purpose of production, reformation, or education.[24] In so doing, disciplines take over the role of bringing the network of power to bear on each and every individual. Foucault writes:

> the disciplines are the ensemble of minute technical inventions that made it possible to increase the useful size of the multiplicities by decreasing the inconveniencies of the power, which, in order to make them useful, must control them.[25]

Discipline not only partitions individuals, it also operates a binary division of the world: good/bad. Classes in the Panopticon operate along those lines. The normal producing capacity of an individual is assessed and then individuals are distributed into categories depending on their above-average or below-average capacity to produce. Inmates are also classified according to their depravity. The young offender, who is considered a substandard criminal, will not be housed

with the hardened criminal, whose abnormality must not be allowed to corrupt young and relatively innocent inmates.[26] As Foucault notes:

> all the authorities exercising individual control function according to a double mode; that of binary division and branding (mad/sane; dangerous/harmless; normal/abnormal); and that of coercive assignment, of differential distribution (who he is; where he must be; how he is to be characterized; how he is to be recognized; how a constant surveillance is to be exercised over him in an individual way, etc.).[27]

The dividing line operative in discipline is that which separates the normal from the abnormal. It is the divide on which all forms of power rest: 'All the mechanisms of power which, even today, are disposed around the abnormal individual, to brand him and to alter him are composed of those two forms'. This raises the questions: what is a norm? What is an abnormal individual? How does a norm compare to a law?

Are disciplinary sanctions legal sanctions? As such, disciplinary sanctions are extra-legal. They are not ordered as a result of a judicial decision. The inmate will not be removed to another cell or given less food because the judge ordered it. However, disciplinary sanctions operate within a legal framework. After all a prison sentence is part of the array of legal punishments available to the judge when sentencing. The inmate was sent to prison because he was convicted of a crime by a jury and sentenced to prison by a judge. In taking this judicial decision the judge was punishing the convict for a fact (a crime, whose commission had been established at trial), and ordering him to be corrected by the prison system. This correction is then carried out by the prison environment, without judicial oversight and without any laws and legal sanctions regulating the corrective process itself. What the prison sanctions is not individuals who break the law, but the inability to conform to the norm of what is expected of the inmate by the prison staff. This norm is not a legal norm, it can even be construed as an extra-legal norm, but it operates within a legal framework laid down and authorized by the law.

Pain in a disciplinary environment is thus inflicted as a result of a deviance from a norm, which is not a legal norm but can be any extra-legal norm. These extra-legal norms take various guises: they can be a model norm (norm setting a model of behaviour), an average norm (norm regulating what is the average quantity of food, sleep, work, play needed by an inmate), a technical norm (norm defining the correct procedure to carry out a precise task), a rule norm (norm establishing rules of conduct within the prison), a psychological norm (norm setting out the patterns of behaviour acceptable in psychological terms) or a biological norm (norm establishing the criteria of an able-bodied individual).[28]

What is the aim of pain in a disciplinary environment? I discussed reform and correction earlier, I now need to be more precise. An inmate is a person who has been convicted of having broken the law, i.e. having deviated from the

legal norms established by society via the State in its legislative capacity. The aim of the prison is to reform the inmate who deviated from the legal norm and correct the inmate when he/she transgresses the extra-legal norms which are internal to the prison. What is the common ground between the model norm, the average norm, the technical norm, the rule norm, the psychological norm and the biological norm? They are norms that measure, correct and bridge the *gap* between the behaviour of the individual and the behaviour expected of him by supervisors, peers, institutions, communities or society.[29] In norming, individuals experience pain at first, since individuals are asked to comply with norms which are imposed from outside.

These norms are both norming, i.e. they impose norms from the outside, and normalizing, i.e. they norm subjects by allowing them to produce their own norms which are then able to challenge the exterior norms. In this capacity, norms do not only generate pain but also pleasure. Norms are built into the identities individuals build for themselves, therefore they cannot only be viewed as negative agents (Foucault was very clear about that when it came to disciplines, which were subjectivizing).[30] Resistance to norms imposed by power is one of the themes Foucault explores. 'Bodies and pleasures' is to be read in this attempt to imagine a form of resistance to any external norm imposed by society.

Foucault, as read by Stéphane Legrand, opposes two different ways for power to operate. There is the mode of disciplinary power, as described above where norms are imposed from outside by power. The operations of these norms are said both to norm and to normalize individuals, in the sense that norms imposed from outside are then internalized and transformed by individuals. The second mode is that of security, where displays of normal and abnormal behaviour are then used in order to set a norm, which is no longer seen as imposed from outside, but as emanating from aggregate individual behaviours, etc.[31] Here it is easy to see the use of statistics in all the areas of life, ranging from criminal profiling to medicine. In a biopolitical environment, norms are used to identify deviating behaviour, to warn individuals of this deviation from the norm and to set out procedures to force individuals to conform with the norm.

In order to identify norms, understood as a regular pattern of behaviour adopted by rational beings, societies need to develop a fund of knowledge pertaining to the internal rationalities of action.[32] Principles derived from the analysis of economics are used to study human conduct.[33] Economics rest on the principle that individuals make the best rational choice in a given situation to allocate scarce resources.[34] This theory, applied to the field of pain inflicted as a political sanction, means that criminals are no longer normed on account of the minimization of criminal behaviour but normalized according to the nature of the market forces at work among criminals.[35] The rationale for the allocation of pain in the biopolitical era is thus based on risk management.

Risk management is a grounding principle of the new penology which no longer deals with crime as a social ill to be uprooted or with pathological crimi-

nals, but which looks into the likelihood of threat posed by certain individuals and tackles this probability in terms of risk. This risk is then managed by considering the costs of both crime and its self-regulation, i.e. letting crime regulate itself according to the rules of the market for crime, taking into account the State penalties for committing crimes. This neoliberal rationale of the fight against crime thus reaches a balance between an acceptable level of crime and a workable cost of crime for taxpayers. In the biopolitical era, the mode of security infers norms from the way aggregate individuals behave and imposes them individually on beings.[36]

Pain in Bentham

Foucault's theory of pain can be read as being very close to Bentham's. This statement is obvious if one considers Foucault's analysis of disciplinary pain, which is derived from his reading of Bentham's Panopticon. However, the aim of this section is to show that Foucault's concept of security in a biopolitical era can be read as akin to Bentham's theorization of pain in a utilitarian State. Like Foucault, when I use the term pain, I mean pain inflicted as part of a legal punishment.

In the 1780s, Bentham composed a mnemonic verse and printed it in the 1823 edition of *An Introduction to the Principles of Morals and Legislation*:

> Intense, long, certain, speedy, fruitful, pure –
> Such marks in *pleasures* and in pains endure.
> Such pleasures seek, if *private* be thy end:
> If it be *public*, wide let them extend.
> Such *pains* avoid, whichever be thy view:
> If *pains* must come, let them *extend* to few.[37]

Bentham is not remembered as a great poet; he is first and foremost a legal reformer. His poetry is at best amusing and at worst depressingly utilitarian. The aim of the short stanza above is to help citizens and subjects remember the utilitarian rules of conduct. His concern with educating the population in utilitarian principles shapes his works. The form of his writings and the language he uses are chosen for their mnemonic quality. To achieve this aim Bentham names and numbers his paragraphs, draws synoptic tables, defines his concepts and summarizes his ideas in one-word principles. Beyond what this stanza tells us of Bentham's character, it helps to understand what pain is in his philosophy.

Pain is inseparable from pleasure. They are two sides of the same coin. To a certain extent, it is preposterous to try and isolate 'biopolitical pleasure' from 'biopolitical pain'. Nevertheless his stress on pleasures and his repeated use of the phrase 'pleasure and pain' are misleading. In the stanza, pleasures come first, they are to be sought for themselves in the private sphere of the individual and they are the aim of government's action in the public realm. The first injunction is

hedonistic, pleasure is good in itself; the second is hammered home throughout Bentham's philosophy: 'the happiness of the individual ... is the end and the sole end which the legislator ought to have in view'.[38] If pleasure is the cornerstone of Bentham's reform, pain is the means by which this reform will be achieved. Because Bentham is a legal reformer, his concern is with pain, rather than pleasure. It is immunity from pain, avoidance of pain or minimizing pain that are the legislator's rule of action. The legislator should have in mind the happiness of society in each of his acts; Bentham is adamant on this point. However, in practice, Bentham devotes most of his works to the reform of penitentiary institutions and criminal law. The promotion of pleasure is dealt with incidentally in his interest in rewards the legislator can grant and in his reflection on indirect legislation. Bentham is aware of the fact that he cannot offer a pain-free society. However, he can promise to build a world in which pain will not be felt any more than necessary.

If Bentham's pleasures need not be restricted in any way, as we saw in the previous chapter, on the grounds that the more the better, both for the individual and for society as a whole, they are not as excessive as those which Foucault considered. Bentham might not have denied Foucault his pleasures, but in no way did he construe them as being so intense. Bentham did not consider drugs and their effects on pleasures.[39] The closest one can get to Bentham's opinion on Foucault's use of drugs is his discussion of the pleasures of alcohol.[40] Bentham would have first considered the short- and long-term negative effects of drugs on health and social behaviour, and would have then allowed or forbidden their use depending on the circumstances. The last provision excepted, in Bentham's mind, pleasures ought to be intense, long, certain, speedy, fruitful and pure, no matter how excessive these pleasures might be. However, pains ought to be avoided and limited. One ought to enjoy pleasures to the *excess*, without injuring oneself and others, but one ought to inflict on oneself or others *frugal* pain. Biopolitical pleasure is bound to be different in nature from biopolitical pain.

Although Bentham and Foucault remain silent as to the nature of pain – what does one experience when one feels pain? – Bentham does look at the causes of pain. He identifies four sources of pain, which he names physical, moral or popular, political and religious. The physical source of pain springs up from a natural and spontaneous order of things; illnesses and floods, for example, would fall within this category. Moral or popular pains are inflicted according to each individual's spontaneous disposition rather than according to any settled or concerted rule. To illustrate this cause, Bentham gives the example of the house which burns down because the neighbours, on account of their lack of sympathy for the owner, do not help to put out the fire. Political pain originates from the will of the sovereign, as embodied by his/her appointed officers (judge, policeman, legislator, prison warden, etc.). Bentham includes religious pain, although there is evidence that he does not believe that any Supreme Being can inflict pain

in this life or in an afterlife. However, he accounts for this source of pain because believers of a given denomination can model their present behaviour on the fear of some afterlife sanction, as defined in their articles of faith.[41]

Why are the instruments of the legislator pleasures and pains? Because they are 'interesting perceptions',[42] as Bentham calls them. Pleasures and pains are indeed perceptions that shape interest. To follow one's interest is to avoid pain and to seek pleasure. In order to decide on policies, the legislator needs to control interest. The legislator, through the wise use of rewards and punishment, guides subjects as to the right or wrong choices of action they are likely to make. Following the law will allow individuals to avoid the pain of the political sanction while breaking the law will cause the infliction of legal punishment. Fear of punishment in the case of breach is the motive of human action and the only way to ensure that the will of the sovereign is obeyed. However, punishment produces pain. If pains ought to be avoided, then punishment must not exceed what is necessary to achieve the political aim of the legislator.

What pain does a sentence produce? Bentham minutely examines the circulation of pain in the political body. Punishment inflicts pain on the offender, but although he is the object of punishment; he is not, however, the only individual to suffer pain as a result of a sentence. His family and friends will sympathize for his plight. His criminal associates, and the criminal community as a whole, will also feel pain on hearing that he has been arrested, convicted and sentenced. People who might have considered committing a similar offence will fear the hands of the law, if they were to venture down the same path. These are types of pain, different in nature, but which all flow from the act of the judge in passing sentence. The criminal's pain is the physical pain of bearing the corporal punishment ordered by the Court, or the psychological pain of being deprived of their freedom in prison.[43] The relative's pain is the pain of sympathy arising from the knowledge that a loved one will suffer at the law. The associate's pain or the prospective offender's pain are the pains of fear, based on the certainty that similar offences are being or will be investigated and brought to justice.[44] These three types of pain experienced by the offender and his community arise from the commission of an offence. These pains are mirrored in the three types of pains suffered by the victim, his family and friends, and members of the law-abiding community, who fear being victims of similar crimes. Punishment inflicts pain well beyond the body and soul of the criminal.

The offender, and maybe his relatives and associates, derive some pleasure from the commission of the offence: pleasure of expectation at the future enjoyment of wealth or power secured by the illegal act, and, if need be, pleasure of enjoyment of the fruits of the crime. The aggregate sum of pain inflicted by the judge must thus be balanced against the aggregate sum of pleasure produced by the offence. For the act to be considered as a crime and be punished by the

law, it must create more aggregate pain than aggregate pleasure. In Chapter 1, I explained that sexual offences such as sodomy did not create more pain than pleasure. They were acts of a private nature. When the commission of an offence creates an excess of pain over pleasure, the legislator has legitimate cause to provide legal sanction for the commission of similar offences. In doing so, the legislator – and the judge in adapting the tariff to the particular circumstances of the case – has to mete out just the right amount of pain in order to prevent the commission of further offences by the same offender and to deter any other would-be criminal from carrying out his purpose.

So, why does an individual commit a crime? Bentham explains the psychological motives of criminals by his theory of the motives of action. Individuals break the law because they hope to derive more pleasure by doing so than by refraining from doing so. But if punishment is certain, the criminal's expectation of the legal pain inflicted in the case of breach will be greater than his expectation of deriving any pleasure from the act. The principle of certainty of punishment is not only fair policy, to increase aggregate security in the judicial institutions and expectations of security, but also an apt measure to deter criminals from offending or reoffending. It enters into the utility calculus the criminal makes before committing a crime. In assessing the risk of getting caught, the offender will consider whether punishment is highly certain, likely or unlikely.

Foucault's treatment of pain does not offer such a detailed study of the circulation of pain in the body politic. The passage quoted earlier which described Damien on the scaffold had the strategic aim of creating fear in the minds of readers, when it was published in the *Pièces originales* and in the *Gazette d'Amsterdam*.[45] Foucault observed that the aim of publicizing crimes was to cause fear, in order to justify the new world order which disciplinary punishment was creating.[46] However, Bentham's careful study of the ways in which an individual act (a crime) or an official order (a judgement) can affect individuals far beyond the reach of the criminal act or the law is mirrored by Foucault's concept of power. In this, they share a common view on how to trace the will of an individual or of the sovereign over others, not only from a vertical perspective (how individuals obey orders from the sovereign) but also from a horizontal perspective (how individuals shape each other's conduct). Foucault's interest in Bentham springs from his understanding of the way in which power in all its forms is disseminated in society, as exemplified in the circulation of pain in society.

Limits of Biopolitical Pain in Bentham and Foucault

The concept of biopolitical pain seems therefore to be quite straightforward. Pain is qualified with a concept which originates in Foucault, and the term pain could be used in both Bentham's and Foucault's theories. However, such a simple attempt to define the concept obscures the fact that Foucault was critical of the

concept of 'interest'. I am not saying that the concept of biopolitical pleasure could operate without any reference to interest. I explained earlier why this was impossible. Foucault wanted (but did not manage) to operate outside all reference to interest, and he attempted to show the limits of the concept of interest when trying to make sense of the rationalization of human acts. This attempt was made in his lectures at the Collège de France, now published as *Abnormal*. If this attempt failed in regard to biopolitical pleasure, Foucault makes a very valid point in respect to biopolitical pain. I will come to this later.

Bentham's theory on pain raises a certain number of questions, the answers to which will lead us beyond the simple idea of pain. His argument hinges on the principle of *economical* punishment, which is akin to his demand for frugal pain.[47] Good government is a government which spares punishment and which applies only the necessary quantity of punishment and no more. What strategies does Bentham develop to assess the correct amount of pain?

We have seen that pain and the fear of pain operate at different levels in society. The physical pain of the convict is tangible. His/her psychological pain is too, as he/she is likely to feel downcast, and his/her low spirits could even be rated. The primary pain produced by the legal sanction can be defined. However, Bentham believes that he is able to assess the aggregate quantity of pain produced by the spread of news and rumours related to the offence and its punishment. This theoretical leap in the dark is risky, since it is difficult to assess, control and forecast the spread of fear, its intensity and its duration. The mapping of pain is useful in Bentham's overall economy of offences to match the offender's sentence to the crime, and to avoid reoffending or the commission of similar offences by other criminals, but it is difficult to implement in practice.

The economical principle in sentencing also raises other issues. Indeed, in order to punish frugally, one must assess whether the offence was committed by a depraved criminal, or whether it was an accident, which is very unlikely to be repeated. How does the judge determine the likelihood of reoffending, that is, the criminal nature of the offender?

The answers to the questions above highlight the shortcomings of Bentham's theory. Bentham's knowledge of the human psyche had not reached the depths of the unconscious. With the accumulated knowledge of more than a century concerning the psyche, twenty-first-century judges cannot answer the above questions with certainty either. However, today's interest in Bentham's thought on pain rests on the methodology he devised to try to solve the conundrum of the pleasure and pain principle. How can one conceive of biopolitical pain? Instead of pointing to the weak points in Bentham's theory on pain, this chapter is interested in exploring the routes Bentham and Foucault take to devise a system of frugal pain and it shows that Bentham's and Foucault's frugal pain operate in a biopolitical environment.

Interest versus Instinct

So far I have explained the nature and operations of pleasures and pains in Bentham and Foucault.[48] As Bentham explained, pleasures and pains are 'interesting perceptions'.[49] With this phrase, Bentham does not mean that they are of interest, but that they constitute interests. To speak of pleasures and pains is therefore to deal with interests. Because pleasures and pains are so closely intertwined, it is difficult to isolate one from the other. In *An Introduction to the Principles of Morals and Legislation*, when Bentham explains the types of pleasure, he also explains the corresponding pains.[50] This means that the division between biopolitical pleasures and biopolitical pains which I have followed so far is very artificial, and that pleasures and pains need to be considered together if one wishes to make sense of them.

I have shown the shortcomings of a theory on pleasure,[51] which cannot operate fully without the concept of interest – that is, the ordering of admissible sexual acts according to the utility calculus of pleasures and pains. I will now explain why interest is not sufficient to account for pain, more particularly pain originating in a criminal act.

Bentham and Freud on Pleasure and Displeasure

Bentham's utilitarian calculus rests on the assumption that all individuals have an ability to determine what course of action will give them more pleasure. Thanks to punishment and reward, the legislator's role is to steer individual action towards the course where individual and aggregate pleasure will be maximized in the long run. Bentham's main contention is that individuals should be left to seek their best interests. However, some individuals fail to calculate efficiently and choose acts which either maximize present enjoyment, ruining any prospect of future well-being, or maximize individual pleasure at the expense of aggregate pleasure. For those who repeatedly decide on the wrong course of action, utilitarian education steps in. The role of the deontologist is to set rules for individual action to maximize pleasure in private behaviour. Utilitarian schools are also set up to help individuals to explore their best personal and collective interests. In some cases utilitarian education fails, and Bentham provides institutions for those who are unable to calculate efficiently – they are called Panopticons. The aim of the Panopticon is both education of the children of the poor (in the pauper Panopticon) and re-education of criminals (in the prison Panopticon). If an individual is unable to acquire basic calculating skills, he is very likely to remain in the Panopticon or be sent to a post-panoptic institution. Bentham's understanding of human nature is rational and rests on the assumption that acts can be ordered into a simple arithmetic process.

Foucault's analysis of crimes in his 1974–75 lectures at the Collège de France, entitled *Abnormal*, challenges Bentham's founding hypothesis. Foucault analyses criminal confessions. In these reports, the criminals do not give any account of their motives. Society cannot determine the nature of the interest that prompted them to act. In the nineteenth century, psychiatry stepped in to make these acts knowable. Foucault writes:

> the notion of instinct enables the legal scandal of a crime without interest or motive, and consequently an unpunishable crime, to be reduced to intelligible terms.[52]

The term 'instinct' does not appear in Bentham's works and was only coined by Freud after Bentham's death. However, both writers use a common terminology. Bentham speaks about pleasures and pains, Freud about pleasure and displeasure. There are some interesting comparisons to be made between Bentham's pleasures and pains and Freud's pleasure and reality principles. The pleasure principle is the state the psyche aims at. It is a state of minimal excitation, which produces pleasure. This definition echoes Bentham's obsession with minimizing pain and maximizing pleasure. On the other hand, the reality principle is a state under the pressure of a chaotic external world and it generates displeasure.[53]

For Freud, pleasures and pains are no longer viewed as feelings, whose force and quality are assessed by each individual. Rather, pleasure and displeasure are now located within the psyche, both topographically and dynamically. Of course this also means that Bentham's pleasure is not Freud's. The latter lacks the quality of being incarnate as feelings experienced by the body. Freud's topography can be said to be imaginary whereas a topography of Bentham's pain would be able to identify precise parts of the body experiencing pain and pleasure.

Whereas Bentham is interested in pleasure and pain as elements which drive action, Freud deals with pleasure and displeasure as symptoms of processes at work in the psyche, which is his main area of investigation. In doing so, he is the founding father of the study of the human psyche. Beyond these apparent similarities, however, one of the main differences between the philosophers is the issue of consistency. Bentham tries to build a coherent system based on the rational behaviour of beings trying to maximize their best interest. For Freud, individuals, or subjects as he calls them, are inconsistent by nature. The concept of the unconscious is a name for the inconsistencies of life. What is more, inconsistency is at the heart of the psychoanalytical method, since the psychoanalyst (Freud in this case) is a gaze that analyses a subject. The very object becomes the subject. This is true to a certain extent, since Freud's endeavour can be read as an attempt to rationalize the psyche in the same way as Bentham aims to rationalize motives.

However, Freud and Bentham stand miles apart when it comes to instinct. Indeed, not only does the term not appear in Bentham's works, but the very notion of something akin to instinct is foreign to Bentham's mindset and pur-

pose in establishing a utilitarian society. According to him, all behaviour can be accounted for in terms of interest. If I may venture a daring comment, it might be that Bentham was so adamant about rationalizing all forms of action precisely because, deep down, he was chasing after the remnant from failed calculus of interest. This remnant of the utilitarian calculus is not and cannot be accounted for entirely in terms of the most economical choice in a world of limited resources. Bentham was aware of that when he suggested that these untamed individuals be left in the Panopticon beyond their initial sentence. However, in this decision, the calculus remains paramount. Was Bentham aware that some people and some acts could be neither ordered nor explained by the calculus? This is of course a question I cannot answer. No evidence of such a doubt in Bentham's mind has yet been discovered in my reading of published material and manuscript sources.

Foucault and Freud on Instincts and Drives

The term instinct appears repeatedly in Foucault: in *Abnormal* but also in *The History of Sexuality*, where Foucault refers respectively to psychiatry at the end of the nineteenth century and Freud's work on the psyche. What is instinct for Foucault in relation to criminal evidence, and how is instinct understood in Freud's terms?

In *Abnormal*, Foucault refers to instinct to name a crude concept used by early psychologists to explain a force which does not integrate the general calculation of interest. This 'irresistible' force is described in terms of a 'looming up', an 'inflation', an 'exaggeration'.[54] This force has a particular function in the economy of legal punishment. It aims to 'pathologize what could be called the leftovers of these disciplinary elements',[55] that is, it provides motives that would enable a 'crime to be understood and, potentially, punishable'.[56] Motive, i.e. interest, is needed to punish a crime. In the absence of any motive, the crime is unpunishable. The psychiatrist steps in to provide a motive, which is not interest but rather the absence of interest, which he calls instinct,[57] in order to allow the criminal justice system to punish the criminal. As such, this psychiatric discourse of instinct stands at the crossroads of the penal mechanism and the psychiatric mechanism.[58] This instinct is not to be confused with Freud's concept. Freud's later input as regards the concept of instinct needs to be explored too.

In Freud, it is necessary to distinguish between instinct (*Instinkt*) and drive (*Trieb*). The former refers to the innate and purely animal tendency, which seeks the survival and the reproduction of the species. The latter is used in reference to human behaviour and aims at achieving satisfaction. Since I am referring to human behaviour, the term drive is more appropriate than the term instinct in Freud's terms.

Once this powerlessness is established, one can easily understand that, in Freud's theory, patterns of sexual behaviour can no longer be considered as rational,

contrary to Bentham's assumptions. To be more specific, Freud distinguishes ego-drives, which aim at guaranteeing self-preservation and sexual-drives, which seek the reproduction of species per se. Drives in Freud were dominated by the pleasure principle, i.e. that which aims to establish the principle of constancy in a homeostatic system. This changed in 1920 with *Beyond the Pleasure Principle*,[59] where Freud identifies two drives, the life drive, also called Eros, and the death drive, also called Thanatos. The former synthesizes by diffusing the latter and deflecting it in the outer world, whereas the latter, named drive for lack of a better word (it is considered more as the epitome of the drive), has an innate tendency to return to its inorganic state, and does so by destroying and thus being a source of aggression. The death drive is thus the cause of monstrous criminal acts.[60]

Of course, because of Freud's influence on Foucault's thought, comparisons are easier to draw between the two authors. To a certain extent, Foucault's norm could be read as the social norm participating in the formation of Freud's super-ego, which is a sort of separate internal self-image, an ideal against which the psyche can measure up its own behaviours and desires. This image is built up in the course of an individual's personal life. It is an image which allows individuals to capture the image others have of them. Its function is akin to that of a judge or censor.[61] The super-ego is established in the psyche of the young child when he/she rejects the desire to return to the indifferentiation of the maternal body. The young child then takes its place in a network of symbolic relations, which are shaped by his/her experiences and which instil standards of behaviour within his/her psyche.[62]

It seems that norms in Foucault have a similar function to the super-ego, in the sense that norms are imposed (whether normed or normalized) on individuals and then internalized and reconstructed by them. However, Freud's normal is not the community's value judgement passed on an individual behaviour, as in Foucault's norming scheme. Freud's normal is a 'statistical' statement of fact (statistical in the sense of the most recurring behaviour observed). It is normalizing. What is normal is what happens most often, for example behaviour that aims ultimately at reproduction. However, as a drive is not an instinct, perversions, in Freud's terms, occur. By perversions, I mean sexual behaviour that does not aim directly or indirectly at reproduction, which leads us back to comments made in Chapter 1.

Towards a Concept of Biopolitical Pain

The above compels us to reconsider the part played by interest in pain originating from a political sanction. Interest cannot account for all acts committed by individuals, especially the most monstrous ones. This is the reason why medicine and the penal administration came up with the concept of instinct. This concept, which was created to account for abnormal acts, will then, with the aid of psychoanalysis, be used to describe any type of irregularity, any deviation from a norm:

> Everywhere, all the time, in the simplest, most common, and most everyday conduct, in its most familiar object, psychiatry will deal with something that is an irregularity in relation to a norm and that must be at the same time a pathological dysfunction in relation to the normal.[63]

Pain in the biopolitical era contains an element that cannot be accounted for in terms of interest. This remnant was called instinct, but can simply be referred to as that which is not interest, or the deviation from a norm.

However, what is true for pleasures is also true for pains and vice versa. Examples to illustrate the effects of instinct resort to both pleasurable and painful acts. Biopolitical pleasure and pain are unworkable without both interest and instinct, which is, however, a contradictory conclusion since interest and instinct, understood in Foucault's and Freud's sense, are mutually exclusive. One way of making sense of this inconsistency is to construe interest and instinct in terms of norm. Interest can be construed in terms of a norm and instinct in terms of a deviation from that norm.

In what sense can interest be construed as a norm? There are several meanings of the word norm, only one is appropriate to describe the operations of interest in Bentham's thought. I have distinguished norming from normalizing. In Bentham's perspective, interest cannot be a norm imposed from the outside by some exterior power to coerce behaviour into complying with it. However, I think there are convincing arguments for considering interest as a normalizing principle, i.e. a principle derived from the observation of human behaviour. To see this, let us consider the opening statement of *An Introduction to the Principles of Morals and Legislation*:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: any effort we can make to throw off our subjection, will serve but to demonstrate and confirm it … The principle of utility recognizes this subjection, and assumes it for the foundation of that system.[64]

It is from nature that the norm of pleasure and pain is inferred. It is presented as the only norm which motivates action and which is internalized by agents as the guiding principle they should adopt to choose how to behave. Of course, Bentham did not construe utility as a norm, but as the truth of human action. The idea of norm raises the historical and social relativity of a principle such as utility, which was not an argument Bentham would have been ready to accept. However, at a meta-linguistic level, interest functions as a norm.

Instinct was defined by early psychologists as the absence of norm. If I agree to keep this definition, I can consider the concepts of interest and instinct on a

scale. On this continuum, ranging from interest to instinct, the highest ranking point would be reached when an individual has complied with the norm fully, and this state would be called acting according to one's best interest; and the lowest ranking point would be reached when an individual has failed to comply with the norm, and this state would be called acting under the spur of instinct.

If I envisage a continuum between interest and instinct, then I can reconcile the workings of biopolitical pleasures and pains. The *ought* of a biopolitical environment is to comply with the norm set as the principle of utility, i.e. maximization of pleasure and minimization of pain. The *is* of a biopolitical environment is a continuum of human action, which ranges between the norm of interest and the unconscious, uncontrolled and unplanned surges of instinct.

Conclusion

What is the rationale for pleasure and pain in a biopolitical world? If one agrees with the assumption that we are living in a biopolitical era governed along the lines outlined by Foucault in his writings, then the question is: how do pleasures and pains operate? Foucault offers an insight into these operations. However, these insights are full of unworkable inconsistencies. From the perspective of a Bentham scholar, and because it has been shown that Foucault's view of governmentality originated in and was both framed by and built against principles of classical utilitarianism, the way out of Foucault's conundrum was to look at ways in which Bentham could offer guidelines of how pleasures and pains should operate in our biopolitical era. This endeavour needs new conceptual tools to construct a biopolitical (utopian) reality which borrows from Foucault and Bentham, but is in no way Foucault's or Bentham's.

In the quest for these tools, I coined two concepts: biopolitical pleasure and biopolitical pain. These concepts arise from the comparison between Bentham and Foucault, although the input of the theories of the two philosophers in the formation of these concepts is not the same. On the one hand, Bentham is summoned to fill in and potentially move forward Foucault's concept of 'bodies and pleasures'. The resulting operating pleasure is called biopolitical pleasure, which borrows from Bentham's utility calculus to assess the limits of acceptable and unacceptable pleasures. In this case, interest has come to the rescue of Foucault's pleasures to allow them to function properly in a biopolitical environmement.

On the other hand, and from a historical perspective, Foucault highlights the inconsistencies of resorting to interest alone to make sense of criminal conduct. Instinct, as the denial of interest or as the name given to the deeper workings of the psyche, blows apart the apparent all-encompassing nature of interest as a concept to explain conduct.

The study of Bentham and Foucault displays a different working of pain, especially in the case of pain caused by criminals or inflicted as part of a punishment by the political sanction. Here interest cannot function without what Foucault calls instinct. Taking instinct into account forces us to reconsider the operations of both pain and pleasure in a biopolitical environment. Acts are now seen as spurred by motives, which range from compliance with interest to surges of instinct.

Comparing Bentham and Foucault on the issue of pleasures and pains allows us to construct continuations of both Foucault's and Bentham's theories of pleasures and pains. The resulting operating concepts are those of biopolitical pleasure and biopolitical pain.

PART II: UTILITARIAN CONDUCT OF CONDUCT

INTRODUCTION: LEGAL NORMS, EXTRA-LEGAL NORMS AND UTILITARIAN CONDUCT

> When one speaks of power, people immediately think of a political structure, a government, a dominant social class, the master and the slave, and so on. I am not thinking of this at all when I speak of relations of power. I mean that in human relationships, whether they involve verbal communication ... or amorous, institutional, or economic relationships, power is always present: I mean a relationship in which one person tries to control the conduct of the other.[1]

> Power ... is the power of disposing of certain things and certain services of certain persons with a view to a certain end.[2]

Bentham identifies three ways in which one can influence conduct: direct legislation, indirect legislation and private deontology.[3] The aim of Part II is to examine the first two ways in which individuals and institutions control behaviour and to see how they can be read in terms of Foucault's conduct of conduct. Chapter 3 will consider the role of law in social control, and Chapter 4 examines the impact of the provisions of indirect legislation on the modification of human behaviour.

Part I of this book established a certain number of points concerning Bentham and Foucault's theories. First, it examined how pleasure and pain could operate in a biopolitical environment. The study showed that pleasures and pains could only function if they were considered as norms. This is true of Bentham's theory: the utility principle (where utility is understood as interests)[4] is now to be understood as a norm. And this is also true of Foucault's bodies, whose feelings are experienced through the lens of injunctions to conform to a normative behaviour, the norm originating from different sources of power, of which Foucault is one.

The next two chapters examine the concept of biopolitical norm. As Bentham is first and foremost a legal reformer,[5] Part II opens with a discussion of the role of law as a means of social control. The opening statement in *An Introduction to the Principles of Morals and Legislation* is addressed to the legislator, not to the individual.[6] Chapter 3 will thus focus on the role of legislators and laws in controlling behaviour.

Laws derive their legitimacy from their ability to produce more happiness than displeasure.[7] This is of course contradictory in the fact that laws, by setting a sanction for their transgression, produce pain. However, according to Bentham, the sum of pleasure produced by the laws is greater than the pain they cause and laws are thus the means used to promote happiness rationally.[8] The principle of utility explains the operations of laws, because it explains how punishments have an effect on motives to act.[9] A motive is a simple identifiable cause, in relation to direct and indirect legislation.[10] Since behaviour is the way in which pleasure and pain express themselves, motives are used as a tool for the legislator to influence action.[11] Calculation is a way of determining which is the strongest motive that will lead to action.[12] On the basis of the existing literature on Bentham and Foucault, Chapter 3 considers what it means to view laws as norms in a biopolitical world.

Chapter 3 establishes that utility is the meta-norm of the content of the legal norm. However, since in practice Bentham acknowledges that no law is in keeping with that meta-norm, then the effective validity of laws originates elsewhere than in the meta-norm of utility. Bentham's 'disposition to obey'[13] and Foucault's 'lasting disposition'[14] confer validity on laws. Through this analysis we can consider the role of law in Bentham and Foucault within a network of power, based on the relation between the governors and the governed.

Chapter 4 then turns to indirect legislation, a field in which Bentham's work is of interest. Whereas direct legislation is both coercive and normative, indirect legislation is viewed first and foremost as a secretive influence making individuals conform to what is expected of them, without coercion.[15] As for legal rules, indirect legal rules do not escape a normative operative framework, since the aim of indirect legislation, like that of direct legislation, is to make individuals conform to what they ought to do.[16] Foucault referred to this concept of influence as the conduct of conduct. Chapter 4 looks at one specific tool of indirect legislation – publicity, which prevents misrule. The functioning of publicity and the ways in which it promotes and guarantees the emergence of the public will are analysed with reference to Bentham's works, but also in relation to Foucault's concept of power and Habermas's theory of the public sphere. Bentham conceives of indirect legislation in the same way as Foucault theorized the conduct of conduct in a biopolitical world. Bentham's subtle analysis of the circulation of power among governors and between governors and the governed is akin to Foucault's horizontal and vertical networks of power.

3 LAW, NORM AND THE CONTROL OF CONDUCT

Introduction

This chapter is founded upon Christian Laval's idea that:

> because he wanted above all to get rid of the juridical conception of power, [Foucault] eventually adopted a theory which is quite close to that of Bentham, that is, which does not restrict power to the political domain, but rather considers it as inherent to all human relationships.[1]

Laval's assertion is based upon the analysis of Foucault's last essays, written when he was teaching at the Collège de France, and more especially *The Birth of Biopolitics*,[2] in which Foucault re-established Bentham as one of the theoreticians of liberal governmentality. Such a mode of governing is organized around the principle of less governing, of what Foucault called 'frugal government'.[3] Laval establishes a relationship of intellectual lineage between Bentham and Foucault which goes beyond *Discipline and Punish*[4] and makes it possible to 'skip over' the disciplinary moment.[5] It is no longer possible to consider Bentham as the forerunner of totalitarianism, as a whole generation of readers of Foucault has done.[6]

Though it may be easy to find ideas shared by Bentham and Foucault on the issue of disciplinary techniques, since Foucault founded his theory of panopticism[7] on the project Bentham and his brother invented,[8] it is, at first sight, much more difficult to find links between the two authors on issues that are strictly speaking legal. In the first volume of *The History of Sexuality* Foucault quotes 'the king has yet to be beheaded',[9] which may be compared with the following quote from Bentham:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by *the* sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.[10]

If Foucault's aim was to show that, in the contemporary state, power does not work as the Marxist model of the centralized state,[11] represented in the model of sovereignty, but rather follows a capillary and regulatory system, represented by the disciplines and biopolitics, then the two quotes above reveal the gap that exists between the two authors. The aim of the present chapter is to explain Foucault's and Bentham's conceptions of the law, in their relation to the concept of norm, and to examine the place of Foucault's reading of Bentham from the point of view of their legal theories.

The Concepts of Law and Norm in Foucault's Writings

There has been a renewed interest in Foucault's ideas since the publication of the lectures he gave at the Collège de France. In each field of study, in France and internationally, researchers have reconsidered first their interpretation of Foucault's work in the light of these last writings,[12] and following that, their views of the future.[13] Up to now, and paradoxically enough, legal studies have not participated in that collective re-appropriation of the work of one of the last great philosophers of the twentieth century.

Indeed, only two books have been published on 'Foucault and the law', and both have been written in English.[14] To the best of my knowledge, no French book on this subject has been published to this day. A symposium on 'Trente ans après *Surveiller et punir* de Michel Foucault: Repenser le droit pénal' was organized in 2006 by the University of Geneva, and the proceedings were published in 2007. The symposium examined Foucault's thought from a criminal perspective. The organizers wanted to offer a new reading of *Discipline and Punish* and thus invited historians, philosophers and practitioners of criminal law to participate. The proceedings show that they only half achieved what they had intended to do, for no jurist contributed.[15] The perspective they adopted was first of all sociological.

There are at present three different avenues of research on Foucault's work on law. The first is sociological and is supported by two pioneers on the issue, Alan Hunt and Gary Wickham (1994), who assert that Foucault expelled law from his theory of power. Law is at the service of other forms of power, that is to say discipline, governmentality and biopolitics.[16] The second is the philosophical approach of François Ewald (1991), which points to some hybridization and interdependence between norm and law[17] and makes it possible to separate the legal sphere from that of norms.[18] The third and last approach is the legal one and is supported by two jurists, Ben Golder and Peter Fitzpatrick (2009). They have undertaken to give a meaning to the dichotomy Foucault established between a fixed and immutable sort of law, which is the law of the sovereign, and a labile sort of law, the content of which is only determined by the transgressions

and resistances that it is out to control. Hunt and Wickham built on that same dichotomy to assert that Foucault expelled the law.

The present work requires that Foucault's thought, in both its chronological development and its nuances needs to, be taken into consideration globally, for the pieces he wrote on the issue are scattered throughout his work.[19] I have also used the most recent interpretative theories of English-speaking writers, in particular those developed in Golder and Fitzpatrick's book, *Foucault's Law*.

The aim of this chapter is to refute the assertion that Foucault expelled the law from his theory of power,[20] and is founded upon the convincing arguments of Golder and Fitzpatrick. Indeed, they point out the fact that Hunt and Wickham's reading is partial and fails to take Foucault's methodology into account. Foucault was always quick to make clear-cut assertions, which he later qualified.[21] His chronological divisions, which produce a shift from the era of sovereignty to that of discipline and utlimately to that of biopolitics, must be qualified by the points he repeatedly made that they were not consecutive but concurrent. Hunt and Wickham's assertion that Foucault expelled the law from the era of biopolitics is founded upon the succession of eras.[22] Taking into account Foucault's qualifications of his own assertions, Golder and Fitzpatrick question Hunt and Wickham's theory of an expulsion. The law, the armed wing of the era of sovereignty, is also present in the other two eras – those of discipline and biopolitics.[23]

Golder and Fitzpatrick's analysis goes even further, since it highlights the essential role the law plays on two counts in the working of discipline. First, disciplinary techniques are justified by the law,[24] the foundation, organization and objectives of a prison, for example, are regulated by statutes. What is true of a public institution is also true of a private one. The organization of work in a factory is also regulated by labour legislation, which determines hours of work and rest, safety measures, and how employees are represented. This is as true today as it was in the nineteenth century thanks to the first laws limiting the working hours and employment of children (1802 and 1833 Factory Acts in Great Britain, and 21 March 1841 law in France, etc.). Secondly, Foucault took into account the mechanisms of punishment of any individual who resists disciplinary controls.[25] Minor infringements to the rules and regulations are addressed through internal procedures, while major transgressions, such as the murder of a fellow prisoner, illegal strikes or large-scale destruction of equipment, are regulated by the criminal code. In the disciplinary era, the law seems to be a principle legitimating the disciplines as well as a mechanism regulating the failures of the re-education undertaken by disciplines.

What is true in the disciplinary era is true in the biopolitical era on two accounts. The law controls the regulation of populations by determining or limiting the field of action carried out upon individuals (what sort of data is collected, what is public and private information, what use is made of data, what sorts of

interventions are carried out upon populations, etc.) and is called upon when populations cannot be ruled by biopolitical regulation (as in the case of riots, epidemics, etc.).[26] Moreover, biopolitics is nothing more than the process of disciplinary controls that is adapted to masses of individuals[27] who are managed in terms of population.[28] It is, at the level of populations, what discipline is at the level of individuals. As a macro-regulating system, it is therefore founded upon the mechanisms of micro-regulation of discipline.[29] Hunt and Wickham's approach can only be partial and does not reflect the complexity of the working of eras in Foucault's work. On this point, Golder and Fitzpatrick's criticism is relevant.

However, it is difficult to subscribe to some aspects of Golder and Fitzpatrick's theory; in particular their criticism of Ewald's work, is based on erroneous assumptions. Ewald asserts that in the biopolitical era the law exists in the form of social laws.[30] His theory shows the point where the law meets the biopolitical objectives of the regulation of populations. But Golder and Fitzpatrick missed it, because Ewald identifies the law with the norm. According to them, Foucault's law is twofold: either it is determined, in other words it is a norm, or it is reactive, that is, it evolves so as to adapt to the resistances it has itself caused.[31] Without questioning such a distinction, the present work rejects the immutability of the norm which is implied in that dichotomy. My criticism is based on a detailed analysis of the notion of norm which challenges Golder and Fitzpatrick's arguments, while opening up new ways for the consideration of the law and the norm in Foucault's work. This is based upon the conclusions of Stéphane Legrand,[32] who has studied norms in Foucault's work. His analysis questions the identification of the norm with a definite content.

According to Legrand, the word 'norm' has five different meanings. It may be (1) a regularity that is noticed in some practices; (2) the elaboration of a model to account for a regularity which is afterwards established as a norm; (3) a rule that individuals consciously follow; (4) an action that is considered to be the most rational one in a given situation; (5) a condition of the working of a biological being or of a mechanism.[33] The five meanings of the concept of norm show that the norm is far from being established and may be used differently in different contexts. Moreover, it appears as a social fact which is only acknowledged as being normative in some circumstances and observers.[34] There is no normative utterance as such. There only exist statements that take can on a normative meaning depending on the context in which they are uttered. That is what makes Legrand say that:

> There is no norm (really existing as such) but only a dispersion, a dissemination of materially existing statements, which may be determined as norms following some given code and may actually work within the frame of some practices.[35]

Considering norms from the point of view of the observers and individuals who submit to them allows the rejection of any fixed state of norms. There is not one norm, but norms, which are articulated the one with the other and/or carry out transfers of codes.[36] Norms therefore are not set but seem to be fluctuating spaces of exchange.

How do norms operate in Foucault's work? Within the disciplinary space, the object of surveillance is not the individuals themselves, but the adequacy, or the lack thereof, of the behaviour of individuals to the norm.[37] What the disciplinary punishes is the lack of compliance.[38] The field of what is punishable is therefore defined by the deviation from the norm.[39]

What exactly is that norm which operates in the disciplinary field?[40] It assumes different forms. It is the norm-model which characterizes and classifies individuals after they have been organized into a hierarchy; it is the norm-average, which determines the types of groups the individuals are allocated to; it is the norm-technique, which breaks down the movements of the body so as to maximize the workforce of the human-machine; it is the regulating norm, which punishes and penalizes; it is the psychopathological, psychiatric or biological norm, which qualifies or disqualifies individuals by marginalizing them.[41] In detention centres, where they fully apply, disciplinary norms are at the crossroads of the external norms with which the individuals within those institutions are being educated or re-educated to comply, and the norms that are internal to the institutions themselves, as previously defined, and which are modelled on external norms while keeping their autonomy.[42] A norm can only apply from the moment the difference between what is the norm and what is not has been established.[43] Legrand uses this distinction to put forward the structural reasons for the failure of the prison system. Prisons are institutions to which individuals have been sent by a decision of the court,[44] but where, paradoxically enough, the law is being suspended.[45] This preliminary analysis of the norm in a disciplinary environment allows Legrand to define Foucault's word 'normation', which is the operating mode of the disciplinary norm, as:

> The coercive imposition of types of actions, of modes of behaviour, and of ways of being, as far as they take the form, in those who are submitted to the normation, of 'lasting dispositions' to act and behave in such a way.[46]

Foucault's work on disciplines leads him to explore the processes of subjectivization that are consubstantial to any normation of individuals.[47] In other words, a normative power (which imposes norms, as defined above) is a power which produces normativity in individuals that have been normed, that is, the capacity for themselves to create other norms that will question the content of the norms that have initially been imposed on them.[48] He calls this action normativity and defines it as follows:

> The action of norms insofar as it is not imposed from outside upon the subjects but is relayed by them, insofar as it establishes them as subjects in a movement which, as subjects, they are at the same time the supports and the operators of, but insofar as they are at the same time seized as objects in a concrete and definite situation.[49]

The working of the norms follows a pattern which produces norms and counter-norms in the biopolitical sphere.

In his analysis of norms in Foucault's work, Legrand forbids any attempt to conceive of the fixity of norms. As he explains, 'the power which normalizes, which imposes norms, is not an external power imposing fixed norms'.[50] We have seen that the norm is not unique but manifold. Its action produces different effects depending on whether it norms on the disciplinary level or on the biopolitical level. Its content is different and depends on its objectives (producing, healing, punishing, etc.), but the signifier common to all forms of norms is the gap, what Legrand calls 'the empty signifier of the deviation-as-such-to-the-norm'.[51] This common signifier cannot be identified to a fixed content, since it is filled when a precise objective permits the connection with a form of normativity.[52]

The opposition between the fixed law-norm and the reactive law that Golder and Fitzpatrick propose is therefore untenable, even if it was useful to them in their criticism of Ewald on two accounts. First, in rejecting the social expression of the law in the biopolitical sphere, and secondly in building an alternative theory of the law in Foucault's work, the expression of which, in biopolitics, would be human rights, which are presented as adaptable by nature.

The perspectives that Golder and Fitzpatrick's arguments opened oblige me to chronologically situate Foucault's words, and to take into account the context in which they were uttered. In their last chapter, entitled 'The Future of Law',[53] Golder and Fitzpatrick develop the theory that, in a biopolitical era, the future of the law lies in a changing conception of it, as it is always intended to become other than it is so as to avoid being absorbed by power.[54] The law is the source of our living together and it manages to fulfil that function thanks to its capacity to be reactive.[55] They find an expression of such a law in the comments Foucault made on human rights. From a discursive point of view, they manage to theorize the law as a source of sociability[56] through a long-winded argument, based on Foucault's last writings. In his lectures at the Collège de France,[57] Foucault explored the ethics of the Ancient Greeks, which needs to be understood as constituting the management of their behaviour and that of others and considered as a form of sociability.[58] That management of behaviours was carried out through a certain asceticism, which differed from the Christian one in that it aimed at fashioning the existence and behaviour of a human being.[59] The subject, as Foucault saw it, is not a given, but the constantly changing result of a political negotiation with and through others.[60] With this conception of the human being, the only law that could regulate human interactions is a law

that would adapt to the constant mutations of the individual.[61] Foucault's interest in the ethics of the Ancient Greeks must be understood in relation to his global strategy. While studying the effects of power in his writings on discipline and biopower (or biopolitics),[62] Foucault analysed the means used by individuals to resist their being normed. In *The History of Sexuality*, Foucault opposed bodies and their pleasures to sex and desire.[63] His interest in ancient asceticism must therefore be read in the context of a search for an alternative to the being-for-oneself-and-for-others, which would offer a mode of resistance against the disciplinary and biopolitical power, and a mode of development of alternative socializing forms. That potential for resistance reads as a sort of creativity and aesthetics.[64] This subjectivity must not be considered as an alternative to the normation or normalization within the institutional space since, as we have seen, the being, as Foucault understood it, is part of a web of sociability which is built through a negotiation that is mediated by norms,[65] and since norms themselves norm and normalize, and therefore generate subjectivity and resistance.

The problem of Foucault's approach is that the word 'resistance' is not theorized. It cannot be, for the simple and good reason that the minute an object is defined, it is fossilized in a relative permanence that no longer allows it to work as a mode of resistance.[66] When he was pushed to his limits, Foucault felt compelled to explain what he meant by resistance,[67] thereby limiting the specific creativity of that mode of action. Such an internal contradiction may be explained partly by the context in which the comments were made, as they were often made in magazines with a homosexual readership.[68] The discourse had therefore a clear strategic intent. Such statements show a shift from a university-oriented discourse to a discourse with political objectives. As much as the cries of bodies and pleasures conveyed an obvious and revolutionary intention, the statements on a 'new relational law' and 'we have … the right to be free'[69] seem to have been more polemical than academic. This must not discredit the role of resistance in Foucault's thought, but rather qualify the way it operated within his theory.

Let us come back to the first point, Golder and Fitzpatrick's debatable criticism of Ewald's work, and the possible consequences that it may have for the present work. Ewald reads Foucault's eras as a shift from the law in its legal sense (that is, as the expression of the power of the sovereign) to the law as a norm (that is, as representative of the working of the law in the biopolitical era). That reading is valid, since there is no reason to refuse the expression of the law as a norm in the biopolitical era on account of the fixity of the norm. Ewald sees social law as the utmost expression of biopolitical law, in other words, of law as a norm. It is not the same law as that which is manifested through the power of the sovereign in the era of sovereignty. Such power is about punishment, and reaches its highest degree with the right to decide on the life and death of individuals.[70] Norms generate laws which are social by nature, since their objective

is to regulate the interactions between individuals. Saying that norms generate laws is the same thing as saying that the law no longer originates in the will of the sovereign, but that it is produced by the common will without being wanted by any particular individual. This is possible because the norm is the result of society's observation of itself, and because no one has the power to proclaim it. The existence of a sovereign parliament is no more than a fiction. The seat of the legislator is empty and this fiction is used to ensure that the governed will remain compliant. The validity of the law comes from the normativity of the latter.[71] Ewald distinguishes three conditions for the operating of a norm in a biopolitical context: (1) The norm is based upon statistics and probabilities that objectivize it;[72] (2) Contrary to the law, which has a universal and permanent purpose, the norm is relative and temporary. It is only valid for a given group, at a given moment. The norm is therefore a self-referential unit of measure;[73] (3) The norm supposes a dichotomy between what is normal and what is not, and that dichotomy ranks individuals on a graduated spectrum spanning from the least to the most normal. Individuals are ranked on that spectrum.[74]

Following Foucault's method, Ewald expels the sovereign from the law without, however, expelling the law from the biopolitical era. The biopolitical law is a social law without any legislator. It is also a law without any obligation or punishment.[75] Since the individuals who make up the community infer the norm from what they observe, as long as it is not imposed upon them from outside they abide by it.[76]

Social laws (as the expression of the law in the biopolitical era) are dependent upon norms for their application. The norm is what legitimizes the validity of the law and its compelling nature in the eyes of the governed. Such a conception of the law expels those traditionally coercive aspects of the rule of law such as punishment and reward. Is a law without punishment and without obligation still a law? Can what we will call the 'disposition to obey' be enough for a law?[77] Bentham's brilliant study of what a law is may provide answers to these questions.

The Concepts of Law and Norm in Bentham's Writings

In the introduction to this chapter Bentham and Foucault were opposed through two quotes and it would be appropriate to return to them now. In *The History of Sexuality*, Foucault asserted that 'the king has yet to be beheaded'.[78] Ewald's reading of this quote, far from expelling the law from the biopolitical era, reintegrates the law as a norm and not as originating in the sovereign. Bentham, on the contrary, defined the law in a way that seemed to establish the sovereign as the supreme legislator:

> A law may be defined as an assemblage of signs declarative of a volition or adopted by *the sovereign* in a state, concerning the conduct to be observed in a certain case by a

> certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[79]

The contradiction between the two quotes is due to the meaning given to the word 'sovereign'. In Foucault's system, the sovereign represents the monarch of the *Ancien Régime*, who exercises his power upon a territory by means of the law.[80] For Bentham, on the other hand, the sovereign is any individual, or group of individuals, who is obeyed whenever his will is expressed.[81] Foucault's monarchical sovereign is therefore not the same as Bentham's sovereign. Bentham even went as far as to assert that when a monarch expresses his will, common language will not call his act a 'law',[82] even though, in his theory, these acts of the monarch's will are to be understood as laws in given contexts. Clarifying how Bentham and Foucault understood these words reveals the contradiction; in order to refine the comparison, the role played by the sovereign in Bentham's writings must be further examined.

Contrary to the empty seat of the legislator mentioned in Ewald's interpretation of Foucault, the function of sovereign in Bentham's system may be fulfilled by any person who meets certain requirements. The expression of his will is called a 'law'. The word 'law' in this context has a much broader meaning than that which it is given in common language.[83] It is not the importance of a given order which makes a law a law,[84] but rather the source of the law, which is the will of the sovereign. A law may be a mandate[85] issued by the sovereign, a law that has been passed by the parliament, the order of a general, an injunction of the paymaster general, the ruling of a judge, but also an order given by the father to his children, by his wife to the servants, by the employer to his employees. Bentham explains:

> The mandates of the master, the father, the husband, the guardian, are all of them the mandates of the sovereign: If not, then neither are those of the general nor of the judge. Not a cook is bid to dress a dinner, a nurse to feed a child, an usher to whip a school boy, an executioner to hang a thief, an officer to drive the enemy from a post, but it is by his orders. If anyone should find a difficulty in conceiving this, he has only to suppose the several mandates in question to meet with resistance: in one case as well as in another the business of enforcing them must rest ultimately with the sovereign.[86]

How can the position of the sovereign be occupied by any person whose order is accompanied by sanctions in the case of disobedience? According to Bentham, a sovereign may express his will in two different ways either directly or indirectly. When the sovereign directly expresses his will, the law is adopted by immediate conception, but when he expresses it indirectly, it is accepted through adoption.[87] Through adopted mandates, the sovereign uses his power of command

to confer upon someone else the right to issue mandates he will adopt.[88] Those powers allow the employer, the father or the government official to make laws in the same capacity as the sovereign. The position of the legislator is therefore far from empty, since it is occupied by the sovereign who may be any person upon whom has been conferred a power of conception or command. That is the reason why a judge's ruling is an occasional law.[89] A law is anchored in a given place[90] and time.[91] The distinction Bentham made between a law by conception and a law by essential adoption is fundamental to the understanding that the law is not the expression of an a-temporal and universal will, contrary to what it is in Foucault's biopolitical law according to Ewald's interpretation of it.

Bentham's theory therefore includes a sovereign, who may be individual or collective, permanent or temporary, direct or indirect. A law is nothing but the expression of his will. The word 'law' is nonetheless problematic when one compares Bentham's and Foucault's theories. Bentham's concept of law (*a law*) has nothing in common, in its usual meaning, with Foucault's concept. Bentham began his study of what a law was by drawing a distinction between a *statute* (the legal disposition that may be read in a text) and a *law* (the intellectual object that comes before the former).[92] Such a distinction is no longer new, but the confusion between these two concepts was common in his day.[93] *A law* can be construed as *a* statute, rather than as law or laws, the meaning of which is quite ambiguous.[94] Thanks to this distinction, it is possible to examine Bentham's theory from the point of view of legal norms, rather than from that of a historical study of a law which would be presented as an instrument of the power of the monarch.

Of what elements is Bentham's rule of law composed? *One* law is not just any expression of the will, it is an expression that will be obeyed. Sanction and reward are therefore essential in determining the meaning of a law in Bentham's theory. Kelsen is of the same mind.[95] Bentham explained that:

> A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases, which come to the same thing, would be so many contradictions in terms.[96]

The social law that Ewald saw as the expression of the norm in a biopolitical environment would not be called a law in Bentham's terminology, for a law which is not accompanied by a whole battery of sanctions in case it is broken is not a law. Does not Ewald's interpretation of Foucault's work therefore go beyond what Foucault meant? Foucault thought that resistance came first.[97] Bentham on the contrary thought that there exists no law without sanction.[98] A social organization devoid of any form of coercion[99] to compel people to obey is a utopian world in which laws are consensual and in which everyone sees the advantage they may draw from a legal provision (without there being any compelling counter-bal-

ancing part that would make people hesitate to abide by it), or a totalitarian world which eliminates any form of resistance. In both cases, there exists no will in the real world that would be obeyed without the threat of a sanction or the promise of some advantage. The examples Ewald uses in his article on the UN resolutions[100] as examples of social law is, quite ironically so, the very example of the expression of a will that history has shown us cannot obtain compliance of a will that cannot therefore be a law.

Sanctions and rewards are the fundamental elements of a law which motivates subjects to obey or which provides punishments when they disobey. The contemporary theoretical books (English *analytical jurisprudence*, Scandinavian realism, American realism, deontic logic, Italian and Spanish analytical philosophy, school of the Pure Theory of the Law) see those elements as prescriptive and permissive norms of a law. Such a reading is anachronistic in the sense that the concept of 'legal norm' had not been theorized at the time Bentham was writing. Bentham himself did not use the word; he used words such as 'rule', 'law' or 'standard'. Words such as 'norm', 'normation', 'normativity' are used by Foucault and by contemporary critics, and here they are used to propose some possible readings of Bentham's legal theory. Does that mean, however, that such a reading is erroneous?

Bentham distinguished between power and law.[101] When he wrote that the sovereign has the power to make laws, he meant 'if the sovereign issues a norm, then it is legal'.[102] Therefore, he proposed a legal theory which, far from being founded on imperatives, as commentators claim,[103] presented a typology of norms which distinguished between coercive, non-coercive, obligatory and unobligatory laws.[104]

If one follows this reading, it is possible to identify another norm at work in Bentham's thought. It is the power-conferring norm, which gives an individual the right to issue prescriptive or permissive norms. According to Guillaume Tusseau, there are four essential elements in a power-conferring norm: (1) the player empowered to issue legal norms; (2) the process which is gone through to issue a norm; (3) the range of application (people, places, times, and activities about which the empowered player can issue norms); and (4) the range of regulation (types of norm (prescriptive, power-conferring, permissive, etc.) the player can issue).[105] Such a typology must however be qualified, for those different norms (be they prescriptive, permissive or power-conferring) are not individual norms but dispositions within a complete norm.[106]

Bentham conceived *a* law as a norm. A norm is made up of normative propositions (prescription, permission, power-conferring), the working of which Bentham studied, basing his theory upon the psychological mechanisms of reward and punishment, in order to transform an expression of the will into an act. This norm is not similar in any way to the sort of social law that Ewald pro-

poses, which is based upon no coercion, and which disregards the principles of power-conferring. Did Ewald overinterpret Foucault's thought? Did Foucault's norms have nothing in common with Bentham's conception of the law? These are the questions addressed in the last part of the present chapter.

Norms and Meta-Norms in Foucault's and Bentham's Writings

Legrand defines the common denominator of norms in Foucault's work as 'the deviation-as-such-from-a-norm'.[107] Can this definition apply to Bentham's work? What is the content of Bentham's norm? Bentham strove to explain how it works, but what about the content? Are all expressions of the will of the sovereign a valid content of Bentham's norm?

Bentham clearly explained that the aim of his work was to establish the common rules of what a law must be.[108] The content of such a law is an abstraction:

> But let the case be delineated ever so exactly, it is still but that individual case that is delineated: to make a rule that can serve for cases yet to come, a new process must be carried on: the historian must give place to the metaphysician: and a general rule must be created by abstraction out of this particular proceeding. And by whom, then, shall this abstraction be performed? by every man for himself, or by some one for all the rest? In the latter case that one man, if his rule comes to be adopted and adhered to, that one man, be he who he will, becomes in effect the legislator.[109]

Does such an abstraction follow a particular rule? It is only the subjects' obedience that gives a statement its legitimacy. Its content does not. This is an important point which offered Bentham the possibility of criticizing a contractualist interpretation of the government, since a cruel and unconstitutional law is as legal as a benevolent one.[110]

What is the source of the content of a law? It is an infraction. It is from a particular mischief, and through a process of abstraction, that a sort of infraction is defined and later becomes the content of a law:

> Every law that is made may be said to have been made upon the consideration of some mischief: of a sort of mischief regarded as being apt to ensue from the sort of act which the legislator is thereby induced to prohibit: which general idea of mischief must originally have been suggested by the idea of some particular mischief which appeared to result from some particular act of the sort in question.[111]

A mischief is at the origin of the content of a law. What is a mischief? It is an action that is harmful, or, in Bentham's theory, an act that causes pain. It is therefore from the assessment of the quantity of pleasure or of pain that have been caused by an act, that an act of the will (by conception or by adoption) will infer a category of acts that must be encouraged or prohibited.[112] The content of the law is determined by the principle of utility. Bentham reinforced this intuition when he wrote that 'The fundamental principle which is the basis of the system of laws here sketched out is the principle of utility'.[113]

The content of the legal norm is therefore utility. This does not mean that if the content is not in keeping with utility the law will not be valid or will be unlawful, since the legitimating mechanisms of a mandate are different, as we have seen. Bentham insisted upon the fact that in a prescriptive theory of the law[114] (and not in a descriptive one) the content of the norm will be in keeping with utility. Bentham was aware that in his day there existed no law that would fulfil the criteria referred to in his essay.[115] Moreover, in a perfect system, any code of law may be improved.[116] The principle that must guide the will of the sovereign is utility. In practice, the content of any law can therefore be situated upon a scale of more or less compliance with utility. The norm, which gives a meaning to the content of the will, is not fixed in practice since it must be thought of in terms of continuum between the maximization and the minimization of the pleasure of the governed.

The act of the will is, in theory, required to be in keeping with a norm which gives a framework to all the other legal norms, which is utility. In that sense, the content of the legal norm according to Bentham is similar to that of the law according to Foucault. The art of governing is founded upon a rationality that is based upon statistics and probabilities.[117] The latter are not an end in themselves, but a means used by individuals, who have been invested with the power to make laws, to maximize their chance of reaching a political objective. In theory, the content of the norm is the signifier without the deviation-from-a-norm. In practice, in the biopolitical era, statistics and probability serve to limit the content of the legal norm. Utility is therefore, in Bentham's and in Foucault's government, a meta-norm which defines the type of content that the legal norm is permitted in an ideal biopolitical world.[118]

Utility is the meta-norm of the content of the legal norm. However, in practice, Bentham acknowledged that no law in his time was in keeping with that meta-norm. His contemporaries nonetheless passed and enforced laws. This means that those laws were valid, even though they were not in keeping with the meta-norm of utility. Utility is not therefore a feature that is necessary to the validity of a law. What is the principle of the validation of a law? What is that formal meta-norm which allows the operation of all the other norms? It must be looked for in what Bentham called the 'disposition to obey'[119] and what Foucault called 'lasting disposition'.[120] The idea of 'disposition' appears in footnotes to the texts of both authors, and its discreet presence could make us forget how essential its operation is to legal norms, especially when compared with the dominance of the binary punishment/reward element. The validation of a law cannot be made from prescriptive, permissive or power-conferring norms only.

Since *Of Laws in General* was published in 1970, commentators have confronted one another on the issue of the meaning given to legal norms in Bentham's writings.[121] H. L. A. Hart criticized Bentham's theory, arguing that the operation of sanctions cannot explain why individuals abide by the law.[122] G. Postema answered that Benham's theory was in fact quite close to that which

Hart had reconstructed from his criticism of Bentham, for Hart had forgotten to take into consideration the disposition to obey, which is manifested in customs and which is the foundation of the individuals' obedience to laws.[123] O. Ben-Dor went even further, for he extended the field of action of the disposition to obey beyond the operation of customs, which is ultimately quite marginal. Ben-Dor, in his brilliant analysis of sovereignty, i.e. of the power to make laws, founded the validity of a law on the critical justification of the people.[124] He analysed sovereignty in Bentham's thought as a divided sovereignty.[125] This needs to be explained as Ben-Dor uses the shift in meaning of the word 'sovereignty' in Bentham: in his early writings, Bentham used the word sovereignty to describe the power to make laws, but in his later writings sovereignty came to refer to the right of the people to locate its representatives.[126] In this way Bentham's thought changed from legal sovereignty to political sovereignty. This implies that sovereignty is founded upon two entities,[127] for the sovereign cannot be the sovereign if the other entity does not acknowledge him as such.[128] The authority of the sovereign is therefore limited by the critical judgement made by the individuals who are subjected to his/her power.[129] Such a division of the power to make laws is the essential form of the working of the legal norm in Bentham.

Foucault was also interested in how obedience works, which he found in the *relation* between the government and the governed.[130] In the era of sovereignty, the monarch was the one who could impose his authority, whatever its form, upon his people (the only remaining question to be solved by philosophers and counsellors being that of the sources to give this absolute will legitimacy). In the biopolitical era, the governed are considered as individuals with interests whose desires must be channelled. The act of governing is founded upon a double relation, in which the interests of the governed are the data that are taken into consideration by the government to define politics (and enact laws).[131] The will of the government is always limited by the interest of the governed, as identified by the administrative apparatus. This is the theory of frugal government, a political theory that justifies the power to make laws by the self-limitation of the power of the government.[132]

Conclusion

Though Bentham and Foucault seem not to have much in common on the question of norms, a more detailed analysis shows that, beyond semantic differences, the concept of biopolitical norm emerges.

A distinction should be drawn, in the theories of both, between the content and the form of the legal norm. Such a dichotomy is founded upon the two meta-norms of Bentham's utility and Foucault's deviation on one side, and the disposition to obey on the other. We have seen that, in the biopolitical era, the

contents of the first meta-norm was made of the maximization of utilities (in the Weberian sense), based upon knowledge, produced by statistics and probability.

Biopolitical norms are hierarchized into norms/meta-norms and subordinated to one formal meta-norm, which is the disposition to obey. Though sanctions and punishments are essential in Bentham's theory and in his disciplinary systems, they are not enough. They need the operation of the meta-norm of the disposition to obey. In the works of these two authors, such a disposition is founded upon an unequal and asymmetrical power-relation between the government and the governed, in which he who imposes a law sees it validated by those who are required to submit to it.

The strength of their theories lies in their accounting for legal norms without delineating either the content or the form of norms. This was made possible because Bentham clearly distinguished descriptive discourses from prescriptive ones, and because Foucault insisted upon the mutability of social relations in which individuals live. In practice, norms grade the action of individuals and institutions upon a scale of conformity to the norm, since the meta-norm of utility only works as a prescriptive objective, and the real workings of the norm in a constantly evolving social environment are taken into consideration. This also applies to the meta-norm of the disposition to obey.

The confrontation of the idea of these two philosophers sheds light on the new working of norms in the biopolitical era.

4 THE SECRET MONITORING PLAN

> Legislation is a state of warfare: political mischief the enemy: the legislator is the commander: the moral and religious sanctions his allies: punishments and rewards ... the forces he has under his command ... direct legislation, a formal attack made with the main body of his forces in the open field: indirect legislation, a secret plan of connected and long-concerted operations, to be executed in the way of stratagem or petite-guerre.[1]

> [Le pouvoir] est bien toujours une manière d'agir sur un ou des sujets agissants, et ce tant qu'ils agissent ou qu'ils sont susceptibles d'agir. Une action sur des actions ... L'exercice du pouvoir consiste à 'conduire les conduites' et à aménager la probabilité.[2]

Introduction

The previous chapter has identified how Bentham and Foucault understood legal norms and punishment as shaping behaviour in a biopolitical world. Although Bentham is best known as a legal reformer, his main claim to glory belittles his overall achievement. Indeed Bentham sought to control individuals far beyond the reach of the law. Punishment meted out by the legal sanction is costly in terms of individual and aggregate pain. It should only be used when necessary and useful to curb behaviour generating more pain than pleasure. However, utilitarian social engineering does not stop when legal punishment is not needed. Bentham aims to control *all* human acts, even those that are not forbidden by criminal law. The field of indirect legislation shows that Bentham is a master in the conduct of conduct, which makes him one of the main theorists of biopolitics. Indeed, when a philosopher bases his whole system on pleasures and pains, on means to control behaviour (otherwise known as motives for action), then it seems obvious that the said philosopher will not limit his/her intervention to the realm of law, but will explore all areas of human behaviour. Indirect legislation and ethics[3] are two of the areas which Bentham uses to reform society along utilitarian principles.

Direct legislation is the most visible means used by Bentham to control behaviour. However, as seen in the previous chapter, while not denying the importance of law, Foucault's lifelong endeavour was to show how society is shaped by forces far more powerful than its traditional operation, which mainly

characterizes the era of sovereignty. Indirect legislation seems then the strategy most likely to unite Bentham and Foucault's vision of power.

The phrase 'indirect legislation' is far from self-explanatory; it is understood as a branch of the law which deals with rewards instead of punishments. More generally, it is the means by which the legislator is going to make citizens do his will voluntarily, under the quasi-invisible guidance of influence or reward, as opposed to the coercive hand of punishment and the law. Indirect legislation is part and parcel of Bentham's work on utility, and runs through his career, from his first writings to the *Constitutional Code* at the end of his life. In the 1780s, when Bentham was working on *An Introduction to the Principles of Morals and Legislation*, he wanted to add a chapter to the seventeen existing ones on the subject.[4] It was finally published in the *Traités de législation civile et pénale* by Etienne Dumont in 1802, and retranslated into English and included in the posthumous Bowring edition of the *Works of Jeremy Bentham* in 1838 as 'Indirect Means of Preventing Crimes', in *Principles of the Penal Code*.[5] In the *Traités de législation civile et pénale*, Bentham compares direct and indirect legislation as follows:

> The aim of direct legislation is to fight against pernicious desires, thanks to prohibitions and sanctions against the noxious acts these desires can give rise to – The aim of indirect legislation is to counterforce their influence, thanks to the increase of less dangerous desires, which can compete with them.[6]

Direct legislation is opposed to indirect legislation. The first deals with prohibitions, which are followed with legal (or political) sanctions in case of transgression; the second with influence. The latter is a subtle engineering of conduct based on the understanding of the motives for action, in order to arrange counterforces to manipulate desire; desire being an individual's perception of what is his or her best interest. These forces are also at work in Foucault's theorization of the conduct of conduct. Both writers use direct and indirect legislation to study the circulation of power in society, which is neither limited to the Marxist top/down relationship, nor confined to institutions, as the Panopticon is often read,[7] but which spreads to the whole of society through the medium of interests used to influence behaviour.[8]

In *Principles of the Penal Code*, Dumont lists the twenty-two ways in which crimes might be prevented through the use of indirect legislation.[9] Of these twenty-two means, only one will be studied in the present chapter, securities against misrule,[10] which is the constitutional branch of indirect legislation. Stephen Engelmann, in 'Bentham's Liberal Government',[11] mapped the operations of indirect legislation, in relation to the prevention of offences. The first aim of government is to secure a safe environment,[12] where crime is minimized and the enjoyment of one's property is maximized. This is the work of direct legislation. The second aim is to guarantee subsistence but laws are useless here,[13] and it

belongs to the realm of indirect legislation. Influence achieves this aim by ensuring an excess of goods to act as a security against want.[14] Among the items of luxury listed, innocent amusements rank high in order to guarantee the means of subsistence[15] and to divert desire from dangerous occupations (for example, music as opposed to pub crawling). Engelmann grounds his argument on unpublished Bentham manuscripts[16] as well as the part of Bentham's works on indirect legislation published by Dumont and Bowring. In his paper, he makes a convincing claim for reading Bentham's indirect legislation as a form of conduct of conduct in a liberal government, in the Foucaultian sense. The present chapter will investigate other areas of Bentham's indirect legislation, as applied to constitutional law, in the *Collected Works*;[17] and will make similar claims.

Penal law defines the territory of forbidden action, and thus draws the line between legal and illegal action. Conversely, indirect legislation furthers the legal behaviour most likely to produce the desired (utilitarian) outcome. At the turn of the nineteenth century, when Bentham wrote both his first essays on indirect legislation (1780s) and his Panopticon writings (1790s), government rationale was moving beyond the model of a disciplinary society, as exemplified by a host of institutions which had been developing for more than a century, towards a society of security, in the Foucaultian sense.[18] Bentham's writings bear witness to this shift.[19] Governments were quick to realize that interests were the means to the end they wished to promote.[20] As the role of government is to ensure the happiness of its subjects,[21] it gears individual interest towards general interest. The issue of the junction of interests, be it natural or artificial, concerned all writers at the time,[22] and is at the heart of Bentham's discussion on the workings of government. Given that all individuals follow the self-preference principle,[23] what are the guarantees a regime can provide to prevent the governors from using their power to further their own interests rather than those of the community?[24] How does an individual delegate his/her power to their representatives?[25] The answers to these questions lie at the heart of the way political power circulates in society, from the electors to their delegates, and vice versa. The means of securing the junction of interests and duty among functionaries (also named agents or trustees[26] in Bentham) is the key to understanding the fabric of a political organization in a biopolitical environment.

Bentham identifies indirect means of legislation in constitutional law as securities against misrule. In the *Traités de législation civile et pénale*, he writes:

> Constitutional law is comprised of direct and indirect legislation. Direct legislation consists in laying out the official positions, among which political power is distributed: this branch is not the object of the present volume. Indirect legislation consists in the general provisions, whose aim is to prevent misconduct, incapacity, or misbehaviour on the part of rulers or their delegates.[27]

Indirect legislation, as it will be dealt with in this chapter, pertains to the means of minimizing misrule on the part of the governors. If, at first reading, Bentham's strategies for guaranteeing the junction of interests and duty seem to be an issue embedded in the concern of his contemporaries and very remote from the worldview promoted by Foucault's biopolitics, the present chapter will show to what extent the interest-and-duty question is rephrased in the modern government rationality, under the guise of the conduct of conducts. Bentham's endeavour exemplifies the formation of a public sphere, where power circulates within and without authorized channels and is constantly challenged. Bentham's utilitarian republic shares many traits with Jürgen Habermas's utopia of perfect communication in the public sphere. However, Bentham, like Foucault, is aware of the existence of competing individuals or of a group of interests struggling to grab a share of power.

Governing Interests

To understand the way in which Bentham governs interests through the operations of an indirect counterforce, called the Public Opinion Tribunal, his theory of government needs to be explained.[28] Contrary to the political theories at the time, Bentham does not separate powers into three branches: the legislature, the executive and the judiciary.[29] Power is lodged in two entities, which are the Supreme Operative and the Supreme Constitutive. The whole of the political power in a State is held by the Supreme Constitutive, which elects the Supreme Operative. The Supreme Constitutive delegates its power to individuals who will act on its behalf.[30]

The Supreme Operative conducts the business of the State according to the will of the people as delegated to them. The relationship between the Supreme Constitutive and the Supreme Operative is one of trust. The latter is composed of two branches: the Supreme Legislative and the Supreme Executive. The first imposes obligations upon individuals, through the introduction, debating and passing of laws; the second gives details of these obligations, in its administrative branch and execution to the legislature's ordinances, in its judicial branch.[31]

The two powers, or the four powers if one wishes to take into account their subdivisions, check and balance the powers of the other branch(es), thanks to mechanisms of subordination. The Supreme Executive is subordinate to the Supreme Legislative. Three powers are granted to the Supreme Legislative over the Supreme Executive to guarantee the subordination of one branch to another: location/dislocation, legal punishment and vexation. The Supreme Legislative has the power to locate and dislocate members of both the administrative and the judicial branches.[32] By 'locate', Bentham means the allocation of a specific individual to a specific position, by electing or by appointing him/her to the position. To 'dislocate' is thus to remove an individual from a given position, on

grounds of misbehaviour, i.e. on the grounds that their behaviour did not conform with the active, intellectual or moral aptitudes required to carry out their duties in the position or in a given circumstance.[33] It has the power to inflict a legal punishment, if the act committed falls within the scope of the law. Members of the Supreme Legislative can also take measures to chastise a functionary who did not carry out their duties appropriately.

The rationale behind these checks, or counterforces as Bentham prefers to call them, lies in his theory of human nature. As seen in Part I of this book, Bentham bases his whole philosophy on pleasures and pains, i.e. on how human beings react to their environment and to other individuals.[34] Pleasures and pain are meta-norms,[35] which cannot be demonstrated because they are based on unchallengeable observable facts. Bentham's theory of interest is the building block of his theory of government. Because individuals seek to maximize their own interest (their pleasure over their pain), and because they are the best judges of what constitutes their own happiness, self-preference is the first and only motive for individual action. This does not mean that a given individual will seek systematically to increase his own selfish well-being at the expense of other individuals. Indeed, individuals are embedded within networks of interpersonal relationships, where the happiness of relatives, friends, peers and fellow citizens is part and parcel of any individual happiness. Although the happiness of other individuals is a factor taken into account by a given individual when deciding a course of action, it cannot guarantee per se that the individual interest will always coincide with the general interest. In other words, there is no natural identification of interests in Bentham.[36] In a theory which is so clearly based on interests, as formulated through the mediation of pleasures and pains, the only way to guarantee that a government will protect and increase the well-being of its governed[37] is through artificial mechanisms of identification of interests or, in Bentham's terminology, through the junction of interests and duty.

What are the political consequences that can be drawn from such a view of human nature? If individuals, whatever their position in society, are motivated by the principle of self-preference, great is the danger of entrusting governors with the power to dispose of the goods and services[38] of the governed. The main aim of government is to ensure the happiness of the greatest number.[39] The only way to achieve this aim is to ensure that the governor acts with a view to promoting the interests of the governed over their own interests. How is this done? Not by relying on human nature,[40] but by setting[41] safeguards to make it the interest of the governors to choose to promote the general interest rather than their own interests.[42] When an individual seeks his own interest at the expense of the general interest, Bentham says that this individual 'sacrifices' the happiness of the community to advance his own:

> In so far, in the instance of the functionary in question, this identification [of interests] fails to have place, the consequence is – on his part, so far as it depends on his endeavours, the sacrifice of the universal interest to his personal or other particular interest: say, for shortness, *the sinister sacrifice*.[43]

The 'sinister sacrifice' is motivated by the 'sinister interest'. If members of the public are expected to follow their best interests, when a servant of the community[44] does so, it is called sinister interest.[45]

The action of legislation can take two opposite directions: first, it can overpower the force of the conflicting interest, thanks to the legal (political) sanction; second, it can prevent the individual from performing an act, thanks to the popular (moral) sanction.[46] Cases related to conflict of interests between the governors and the governed fall within the second category. Bentham does not think it is necessary to impose a legal punishment for these actions on several grounds. Firstly, punishment is costly: it produces pain and should only be inflicted when the aggregate amount of pain prevented by the legal sanction will outweigh the individual amount of pain generated by the act of punishing. Secondly, punishment should be used only when it is useful, that is when it serves to prevent an individual from offending.[47] Thirdly, an act that will endanger the well-being of the community can be difficult to establish. Bentham takes the example of corruption and observes that corruption involves two parties, the corruptor and the corrupted.[48] However, evidence of corruption is not necessarily available,[49] since it can exist without words or acts; a tacit agreement can be sufficient to motivate an individual to act upon an understanding of the benefits he might derive from the corruptor, if he performs a given act in his favour. Without any tangible evidence, it is difficult to apply any form of legal punishment to either the corrupted or the corruptor.

Direct constitutional provisions can also build securities within a political system to fight against what Bentham calls 'misrule'.[50] Bentham quotes a certain number of provisions to be included in a Constitutional Code of a regime, the aim of which is to establish good rule, such as minimizing the power, money and pay at the disposal of the Operative power, and the exclusion of factitious honours.[51] The Supreme Constitutive can also locate and dislocate members of the Supreme Operative.[52] These provisions belong to direct constitutional legislation.

However, the main provision against sinister interest lies in indirect constitutional legislation, which allows the possibility of the operations of a counterforce, such as the indirect mechanism set up by Bentham to prevent sinister interest. Bentham uses a counterforce he names the Public Opinion Tribunal (hereafter POT), which uses the force of the public (moral) sanction to ensure compliance with its decisions. The main opposition of interests in Bentham's political world is between the governors and the governed. This division of the political body is obvious from his distribution of power into two branches, the Supreme Opera-

tive and the Supreme Constitutive. The rest of this section will now examine the workings of the POT, to consider the ways in which the conduct of governors is directed by the public, and vice versa.

The POT is key to Bentham's utilitarian political society. It exemplifies the ways in which the public can control the behaviour of governors and vice versa. It also makes visible the circulation of power within society. Contrary to what the dichotomies governors/governed, legal sanction/public sanction, Supreme Operative/Supreme Constitutive may lead readers to believe, Bentham does not conceive of the networks of powers in society as a binary opposition of interest, or as a top/down relationship. Bentham examines the ways in which knowledge and power circulate among members of the public and outside the scope of institutions (parliament, schools, army, professional associations, etc.). The POT stands as the meeting point between Bentham's and Foucault's theories of power.

Bentham theorizes the concept of the POT in his later constitutional writings. However, the concept of public counterforce, akin to a judicial body, was already present in his earlier works, through the moral (public) sanction.[53] For Bentham:

> By the term Public Opinion Tribunal, understand a fictitious entity – a fictitious tribunal the existence of which is, by the help of an analogy, feigned under the pressure of inevitable necessity for the purpose of discourse to designate the imaginary tribunal or judiciary by which the punishments and rewards of which the popular and moral sanction is composed are applied.[54]

The POT is a fiction,[55] it is not an institution that exists in society as such but, for the purposes of discourse, Bentham uses the concept. Although there is no tangible group or institution which can bear this name, the operations of the POT are real and can be felt by officials, thanks to the sanctions at the disposal of the POT. This definition of the POT exemplifies Bentham's conception of power, which is a fiction, but which nonetheless has effects, in the shape of punishments and rewards, which produce pain and pleasure for individuals. The POT can lay public blame on any official, thereby leading to their dislocation. The punishment applied is in no way legal, but derived from the moral (popular) sanction, since the Supreme Unofficial steps in when legal punishment is unwarranted.[56] It can also shower praise, which is valued above fictitious honours.[57] In all points, the POT acts as a tribunal. It gathers evidence, examines it, hears parties, passes a judgement, publicizes it and executes it.[58]

Who can be members of the POT? The answer to the question might not be as straightforward as it seems. The POT is a counterforce to the power of the Supreme Operative; this means that the POT can be constituted of the members of the Supreme Constitutive only:

> In addition to the power of these possessors of the supreme Operative power, there being no other power in the state but that of the possessors of the supreme Constitutive power, their Constituents, this last, it is evident is the only counterforce which the nature of the case admits of.[59]

This is both true and, at times a simplistic way to describe political power in the utilitarian State. Although constituents (electors) are entitled to be members of the POT, there are great numbers of the public who are excluded from a share of political power and counterforce in the political arena. From a historical vantage point, at the time Bentham was writing, male non-holders of property and male holders of property below a certain value, as well as women,[60] children, convicts and mentally disabled people were barred from voting. From a utilitarian perspective, only children and mentally disabled citizens would have been excluded from participating in the constitution of political power.[61] This interpretation is supported by comments made by Bentham in other writings that 'all those by whom any cognizance is taken of public affairs may be considered as constituting the Tribunal of Public Opinion'.[62] The last statement both opens the membership of the POT beyond mere electors (people who hold the actual political power in the State and entrust it to officials) and restricts it to people who show an interest in the issue at hand.

Moreover, this last distinction allows Bentham to consider the fact that foreigners might take an interest in the affairs of a neighbouring country, or that the colonies are entitled to show interest in the concerns of the mother country. Although not strictly speaking members of the political State in question, Bentham makes provisions for their being included in the POT.[63] However, in other writings Bentham seems to restrict membership of the POT to citizenship of the State in question. When studying the networks of power, considering the operations of the POT beyond the physical borders of a State allows power to be considered as a de-territorialized instance of control, which is akin to biopolitics rather than sovereignty or disciplines.

Allowing voters to be rightful members of the POT raises the question of whether functionaries will be allowed to participate in the POT? Once again, the answer is not straightforward. In some instances, Bentham excludes them, since the aim of the POT is to check the sinister interest of those same functionaries:

> The decisions of the tribunal must be supposed to be the decisions expressive of the volitional and intellectual faculty of an aggregate body in which neither the functionary in question nor any of those of whom it is held for certain that they act in conjunction with him are comprised.[64]

However, in other cases functionaries are included in the operations of the counterforce. The rationale for this inclusion is Bentham's apt comment that if

functionaries, like any other individual, have a natural propensity to follow their own interest, they nonetheless hold a fractional share of the general interest.[65] Bentham divides the POT into two opposing interests: that of the Democratical Section and that of the Aristocratical. The first represents the interests of the subject-many,[66] the second the interests of the ruling and influential few.[67]

If the POT is composed of individuals who share the sinister interest of officials, how can the POT conform at all times with the general interest? This contradiction is only rhetorical since, in practice, functionaries and the Aristocratical Section of the POT are a minority compared to the aggregate mass of members of the Constitutive Power which constitutes it. Decisions taken by the POT will therefore reflect this lack of balance and will necessarily be the expression of the will of the Democratical Section of the POT.

The POT is not one body with one interest, but a collection of sectional interests. The first division is along territorial lines. The territory of the State is divided into so many constituencies, each of which elects one agent who is entrusted with the task of representing its interests in the Assembly.[68] It is to be expected that, among the POT, as among electors, this division of interests will exist, although Bentham does not dwell on it. Thus power as interest is not whole, but consists of shares.[69] The second division is between the members of the POT itself, the holders of political and economic power being opposed to those who are deprived of that power. The decisions of the POT are said to coincide with the general interest, which Bentham defines as the aggregate of individual interest.[70] In a given group, add the individual interests of each member, and the majority will represent the general interest.[71] Of course this arithmetic of interest cannot fail to raise serious doubts as to the protection of minorities and the representativity of individual opinion in issues where there are more than two predefined outcomes: to agree or to disagree.[72]

The last division is along the lines of the ownership of the means of production:[73] the ruling and influential few are the non-productive class, as opposed to the productive classes of the subject many.[74] In another work, Bentham explains in detail the composition of the Aristocratical Section in a way which shows that the ruling and influential few are not only the unproductive classes. He includes, in addition to the landed, titled and moneyed classes and to the functionaries, the legal professions, the religious establishment what he calls the literary and fine art aristocracy,[75] whose contours remain blurred.[76]

Divided interests also means competing interests and conflicting interests.[77] Indeed, Bentham provided for punishment within the POT itself. The moral sanction of the POT, that is of the majority of the POT composed of the subjected many Democratical Section, can be inflicted on the ruling and influential few Aristocratical Section. Bentham explains:

> By the Democratical Section, disrepute will be attached to all such actions as in the conception of its members are pernicious to the universal interest: and that in a degree of force proportioned to the degree of such injuriousness: good repute, to all such actions as in that same conception are in an eminent degree salutary to the universal interest, contributory to the greatest happiness of the greatest number.[78]

It goes without saying that this statement is in direct conflict with Bentham's well-established and publicized principle that individuals are the best judges of their own happiness and that they are entitled to seek their own interests.[79] This provision is an excellent instance of the way in which the moral sanction acts as a means to change the conduct of individuals when their acts do not to conform to the prescribed aim (in Bentham's utilitarianism, utility, or the general interest). When it comes to the conduct of conducts, the POT is the great organizer, de-organizer, and re-organizer of interest.

The division of interests within the POT raises the question of how the different interests and groups in the POT can be fused into a single POT?[80] The statement that the POT is the sum of the opinions of its members is not an accurate description of the ways in which it will reach a decision and apply a popular sanction if necessary. The sectional interests Bentham identifies among the POT disqualifies the use of the singular to speak about it, especially since the two sections identified are described as always having conflicting interests. It is more like two POTs rather than one, if one wishes to be true to the operations of that body. Moreover, Bentham seems to disregard the fact that there are other interests than the aristocratical and the geographical. What about the conflicting interests of the husband and the bachelor, the landowner and the tenant, the corn grower and the sheep breeder, the exporter and the person who works exclusively for the national market? The many sectional interests might not be as entrenched as the aristocratical/democratical divide, but can also create clear and lasting conflicts of interests within the POT and thus disqualify it for use as one body representative of the interests of society as a whole. However, notwithstanding its partial, faulty and utopian nature, Bentham's endeavour should be read from the vantage point of the theorization of a public space. The class of functionaries constitutes a clearly identifiable group of individuals (since they receive public money to perform a public office, on behalf of the rest of the population). Bentham tries to map the opposite group, and this endeavour is mediated by the concept of interest, operating at all levels of society.

The issue of the identification of interests in Bentham is frustrating and is in no way solved by the POT, which reproduces the divisions of conflicting interests in its ranks. As explored in the following section, Bentham hopes to find a way out of his intellectual entanglement by setting the editor of the newspaper as the arbiter of public opinion. This unconditional stand, where the possibility of the sinister interest of the newspaper editor is never considered seriously, dooms Ben-

tham's theorization of a POT. Bentham scholars, including Fred Rosen, share this feeling. Fred Rosen writes: 'Bentham's conception of the POT, on which reform depends, is not altogether clear'.[81] However, Bentham should be credited with trying to identify sources and conflicts of power, and the means used to prevent, check and influence the form and substance of this power. He also builds a theory of power which clearly shows that universal suffrage in a representative system is not enough to guarantee that the elected government will act in the best interests of its citizens, since the guardians harbour sinister interests.

Bentham can be praised for making visible the workings of government and theorizing a counterforce which could check the power of officials and thus enable the public good to emerge. Analysing the directions conflicting interests take is key to this endeavour. However, this endeavour is part of a general strategy to publicize acts, be they those of officials or of non-officials. Publicity is the POT's weapon to force functionaries to conform to the general interest, as the use of the moral (popular) sanction exemplifies, and at the same time, so that the sanctions of the POT do not themselves become tyrannical, its operations are in the public domain. Bentham explains:

> One word – misrule – will serve for conveying a general conception of the disease: another word – publicity, for conveying the like conception of the remedy ... Now as to the remedy. A single word, *publicity*, has been employed for the designation of it. For this same purpose another expression – Public Opinion – might have been employed ... It is by publicity that the Public Opinion Tribunal does whatever it does.[82]

The concept of publicity is enmeshed in a utopia, which is used to theorize safeguards against abuse of power.

The Utopia of Publicity

Bentham shared with the philosophers of the Enlightenment[83] the utopian idea that transparency would solve all the problems of society, from petty crime to political tyranny. Commentators have distinguished between transparency and publicity in Bentham.[84] It is indeed tempting to make this distinction, since Foucault theorized Bentham's Panopticon as an endeavour to create a transparent environment to maximize control,[85] and Habermas showed interest in Bentham's concept of publicity as exemplified in the workings of political deliberative assemblies.[86] By distinguishing transparency and publicity, one could oppose Foucault and Habermas, and lay in stark contrast the outdated Bentham of the disciplines to the visionary Bentham of the public sphere. I contend that both concepts participate in the same endeavour to get words and deeds into the public space, although via different means. In Bentham's terminology, transparency uses architectural means, and publicity relates to institutional safeguards. This stand is also backed by the latest interpretations of Foucault's reading of

Bentham, which highlight Foucault's concept that disciplines could be extended beyond walls to control interests and engineer a utilitarian society.[87] Transparency and publicity work hand in hand. In deliberative assemblies, for instance, the efficiency of modes of proceeding is enhanced by the structure of the venue, which is designed to facilitate communication.[88]

In order to analyse the role of newspapers as tools for publicizing information, circulating knowledge, triggering debates and contributing to the emergence of the public will, expressive of the general interest, the detailed structure of the POT must be explored. Earlier on, in this chapter, actual membership of the POT on a given issue was restricted to members who took an interest in it. As in a tribunal where the judges, jury and parties change in each case, the POT is not a permanent body composed of permanent members, but a temporary body whose composition changes for each different case. Here again, the strength of Bentham's analysis of the ever-changing sources of power and influence needs to be noted. Bentham uses several strategies to map the contours of this indistinct body, to which he entrusts the duty of protecting the happiness of the community. First, he divides the body of the people in varying proportions, as occasional members of the POT. The main dichotomy stands between those people who are interested in an issue and those who are not interested in it, the former constituting the POT.[89] Then he uses metaphors, two of which stand out: the judicial and the deliberative. The judicial metaphor is operative in describing the POT, composed of the people at large considered as sitting in judgement of the transaction.[90] The deliberative is composed of sets of circles: the inner circle of informed and active members, and the outer circle of less informed and less active individuals, basing their decisions on the opinion of the first circle. Lastly, in a typology, Bentham details the ways in which one can participate in the POT and hierachizes the various positions:

> In those who belong to it in respect of present practice may again be distinguished [four] classes: viz. 1. those who are merely speaking members: 2. those who are not only speaking but also reading members: 3. those who are not only speaking and reading, but also writing members: 4. those who are not only speaking, reading and writing, but also printing and publishing members.[91]

The admission threshold to be a member of the POT on a given question is low: anyone who talks about the issue qualifies. However, not all members have the same standing. Those members who are part of the publishing profession are given, almost as of right, a seat on the fictitious standing committee of the POT, and the newspaper editor becomes the presiding chair. That is, publishers belong to the inner circle of public opinion power. The POT is further subdivided and hierarchized. There are different ways of taking cognizance of an issue: attending the parliamentary sessions as a member of the public,[92] reading the newspapers, writing pamphlets and political essays, or debating in public. Although all indi-

viduals who are likely to be interested in an issue count for one in the aggregate universal happiness, not all have the same influence. Major players in the POT are given a position on the standing committee, or as the prosecution in a case of official misconduct (the writing and publishing section), and minor players (the speaking and reading section) are allocated to the judicatory. The two metaphors (the judicial and the deliberative) are not interchangeable, but work side by side.[93] Whereas the political sanction belongs to all, the ability to exercise influence of mind over mind is left to the happy writing and publishing few.

What magic formula will allow the sum of individual interests to pass judgement on the acts of an official, to criticize a legislative bill or to introduce amendments to a bill being debated? The artificial identification of interests has been identified as a failure of Bentham's POT in the last section. However, one can read this division within the POT as an attempt to establish the mechanisms which will allow the influence of mind upon mind. Publicity is the magic formula, or rather publicizing words and deeds. This publicity of proceedings triggers a debate, which promotes the emergence of the public will. By winning over individuals to one cause, or another public opinion is forming itself in a way that will contribute to the identification of interests. Indeed the hierarchy of the public is repeated in *Political Tactics* and in 'Identification of Interests', not so much to create an aristocracy of the POT, as to show how publicity will circulate knowledge, improve understanding and promote useful debates.

Publicity is not only a tool to give access to information, but also a tool to shape the public will. Publicity operates at two levels – at the level of deliberative assemblies and at the level of the POT. As we have seen, two metaphors are used, that of the judiciary, and that of the deliberative assembly. When sitting as a jury, the POT is passing judgement on cases of misconduct; when sitting as an assembly, the POT is debating political issues. In both cases publicity, allowed by the combined mechanisms of the unofficial judiciary and the unofficial assembly, will allow the emergence of the public will:

> it is necessary to distinguish the public into three classes: The first is composed of the most numerous party, who occupy themselves very little with public affairs – who have not time to read, nor leisure for reasoning. The second is composed of those who form a kind of judgment, but it is borrowed – a judgment founded upon the assertions of others, the parties neither taking the pains necessary, nor being able, to form an opinion of their own. The third is composed of those who judge for themselves, according to the information, whether more or less exact, which they are able to procure.[94]

In the argument Bentham is making, this division of the public functions to show the benefits derived by each class from the publicity of deliberative proceedings. This use of classes in the POT reappears in the later 'Identification of Interests', where aptitude is said to be 'self-seated', or 'derivative'.[95] The latter

is acquired through the advice taken from knowledgeable individuals, and the former is derived from the reading of the Code in force in a given State, and from the newspapers. What is of note is that access to information is readily available to all, if they want it. The role of newspapers is again essential in both the circulation of information and the publicizing of the public debate. Bentham makes provisions for opinion-less individuals and for channels to shape their opinion, in order that something called the 'general will' should emerge.

The POT is a fiction. However, it needs real individuals to further its aims. The metaphor of the tribunal and of the deliberative assembly is of interest, but it does not explain how the POT works in practice. Bentham gives newspapers the role of mediating among members of the POT, and between the Supreme Operative and the Supreme Constitutive: 'In [the newspaper] may be seen not only an appropriate organ of the Public Opinion Tribunal, but the only constantly acting visible one'.[96]

But here too, the media are a fiction. Bentham identifies the newspaper editor (or his correspondents) as the individual who will take over the task of pointing out misconduct, bringing proof of this accusation and publicizing the decision of the POT, sitting figuratively as a tribunal. Of course, the fictitious courtroom will be in the columns of the editor's newspaper and in any other newspaper which takes sides on the issue.[97] The judgement passed by the editor, and publicized by the printing and circulation of his newspaper, is not reached in a purely judicial procedure since when passing judgement, the Editor is being helped by his position as head or member of a subcommittee on the issue.[98] The judicial and the deliberative metaphor work hand in hand. On each issue, the POT sits fictitiously as a general committee however, just like a real deliberative assembly, the POT is divided into subcommittees, which carry out the work of gathering evidence, evaluating it, publicizing it and forming an opinion, which will then be followed by the general committee. The real power of counterforce held by the POT is lodged in the subcommittees where newspaper editors, political writers, that is the reading, writing and publishing members of the POT, sit.[99]

If Bentham repeatedly states that the decision of the POT to the general interest,[100] nonetheless, he makes allowance for the POT to err.[101] There is a degree of probability that the POT will come to the wrong decision.[102] In this case, as there is no other superior instance to arbitrate, appeal lies to the POT itself, in a procedure where the POT is both judge and jury.[103]

How is it possible to guarantee that the editor will not follow his sinister interest? Bentham hints at the utopian claim for editorial impartiality when he writes: 'On the part of a Newspaper Editor, nothing is more easy than to profess impartiality; few things more difficult [than] to maintain it'.[104] Bentham makes no explicit provisions for securities against editorial misrule. One can read between the lines and see that Bentham thinks that the market will regulate

itself.[105] The partial or misinformed newspapers will be put out of business by better competitors. In the final instance, market forces of supply and demand regulate the POT. The newspaper is a good which is enmeshed in the contradictions of the competition for consumers. Bentham hints at ways to increase its readership, such as dealing with a variety of subjects and balancing pugnacity – which makes for a pleasant and compelling read. This advice is given to increase readership, and thence the circulation of knowledge, which guarantees participation in the POT and accuracy of the decisions of the POT; but indirectly, it secures consumers for the commodity drives the prices down and guarantees economic survival.[106] The relationship between government and economics is blatant in this instance, where the unique political counterforce rests on an economic mechanism for its continued operation. The relationship between government and economics will be further explored in Chapter 6.

Bentham's POT brings to mind Habermas's later theorization of the public sphere.[107] Indeed, Habermas had read Bentham and discusses his theorization of publicity.[108] In a 1964 encyclopaedia article, Habermas defines the public sphere:[109]

> By 'the public sphere' we mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body.[110]

For Habermas, there are two opposing bodies: the State, as public authority, and the public.[111] In Foucaultian terms,[112] the era of sovereignty, where political authority was called upon to rule over a territory,[113] is replaced by the era of biopolitics, where population is the main focus of government action.[114] In the era of the control of populations, the growth of the bourgeois society increases the pressure on the government to share power.[115] The creation of a public sphere, where opinion contributes to policymaking, is a direct consequence of these historical changes, of which Bentham is a witness in his time.

The press becomes a means by which public opinion is going to take shape. The reason is structural, as Habermas explains: 'In a large public body this kind of communication requires specific means for transmitting information and influencing those who receive it'.[116] The press becomes an institution of the public sphere in its function of dealer in public opinion.[117]

However, in Bentham, as in Habermas, there are no provisions to explain how the press can express public opinion other than the opinions of the contributors to the newspaper. Nor are there provisions to explain by which process the public 'constellation of interests' can become a single public opinion, which can be opposed to political authority. Foucault shares this view when he takes

Habermas to task for offering an explanation of the workings of society which verges on the utopian:

> While I, for my part, tend to be a little more in agreement with what he says, I have always had a problem insofar as he gives communicative relations this place which is so important and, above all, a function that I would call 'utopian'.[118]

To the idea of public sphere, Foucault opposes that of power:

> This is precisely a failure to see that power relations are not something that is bad in itself, that we have to break free of. I do not think that society can exist without power relations, if by that one means the strategies by which individuals try to direct the conduct of others.[119]

Habermas, in his article, does not take into account the operations of the 'constellation of interests' and how it can challenge the formation of public opinion. Bentham, in his study of networks of conflicting power (albeit not detailed enough), makes room for such an assessment. He could make his own Foucault's claim that:

> The problem, then, is not to try to dissolve them in the utopia of completely transparent communication but to acquire the rules of law, the management techniques, and also the morality, the *ethos*, the practice of the self, that will allow us to play these games of power with as little domination as possible.[120]

As analysed here,[121] Bentham's endeavour is indeed to devise rules to ensure that power disposes of goods and services with a view to maximizing the aggregate happiness of the people they belong to. Bentham still toys with the utopian idea of a perfect political organization. However, he does not presuppose it, but conceives of a series of mechanisms and counterforces to aim towards the goal of an unhindered flow of knowledge. Bentham attempts to bridge the gap between what for Habermas was the utopia of the public sphere and what for Foucault was a society of power struggles. He does so in his reflection on the formation of the public will.

If one assumes, as Bentham does, that the opinion published in the newspaper is the expression of the public will of the Supreme Unofficial, just as the law passed by Supreme Official in a deliberative assembly is the will of the constituents, how does this will emerge from a multiplicity of information, opinion and interests?

The Quest for the Will of the People

How does the public will emerge from a deliberative assembly? How is it possible to identify the decision of the editor, backed by his subcommittee of the POT, as a decision expressing the public will?

Bentham's thinking on the emergence of public opinion in the press is quite straightforward. The newspaper acts as a forum to express ideas which are then read by many, who can in turn contribute to the controversy, either through the

press itself or in public venues (at home, at work, in social gatherings). Through this process, little by little, a consensus emerges, which is called public opinion. This procedure is simplistic and shows the extent to which the concept of the POT, and the role of newspapers, is still underdeveloped in Bentham's theory.

However, the formation of the public will is given much more attention in Bentham's discussion on public deliberations. The question at issue is how it is possible, for an assembly composed of individuals naturally interested in promoting their own happiness, to come to a decision expressive of the will of the people, that is the general interest? Debate is the key. How is deliberative debate different from debate in the public space? The latter labours under the structural inconvenience of what Bentham calls 'local distance',[122] that is the fact that the members of the POT cannot be gathered in the same room at the same time. Being in the same room allows the enforcement of a deliberative discipline, which is instrumental to the emergence of the true will of the people. As Bentham fights against misrule, so does he struggle against what he calls 'falsifying the will'.[123] The instruments at hand are the disposition of the assembly (to enhance communication), rules of speech,[124] and the display of rules and motions (to avoid ambiguity).[125] Once the true purpose of each member can be communicated accurately, while staying clear of false misrepresentation,[126] the public will will emerge from the debates among members.

What are the operations underlying a debate? Speakers will communicate their knowledge of the case and venture an opinion on this basis. A speech allows the circulation of knowledge and opinion followed by questions, answers and comments which will increase the information at the disposal of the audience, as well as give them new angles to consider the issue.[127] The debate is the time when the individual and general will gradually takes shape and implies that members with different, even diverging, opinions will concur at some stage. This is possible through the process of influence, whereby the debate should ensure the influence of mind upon mind which is necessary to the emergence of the public will, as opposed to undue influence, which leads to the sinister sacrifice.[128] Each speaker in the debate will use arguments to convince the rest of the assembly of the validity of his opinion.[129] The influence of mind over mind, as exercised in debates, leads to the formation of the will, which is expressed in the final vote on the motion. Because the public is to be consulted before the passing of the bill, the time between each reading allows for public debate in the public space, and for the influence of the public, as mediated by the press, to act upon the minds of the legislative agents.[130]

Foucault considers both ways in which power relations operate: through violence and influence.[131] In deliberative assemblies as in the POT, Bentham considers ways in which consent for a decision can be obtained through influence. This consent is obtained without violence, but through persuasive arguments.

Bentham, through disciplinary mechanisms, tries to put aside the idea of consent obtained under duress, which would vitiate true consent.

Bentham studies the formation of the general will and the operations of influence which function to blend all individual interests into this general will. There is not just one type of influence but, for Bentham, two: rightful influence and undue influence. Bentham sets safeguards against the operations of undue influence, which serves the sinister interests of functionaries. These safeguards are to be found in the discipline of proceedings, which closely monitors the deliberations in an assembly. The first, informed and utility-orientated influence of mind upon mind, is necessary to allow the emergence of the general will.[132] Deliberative discipline, by regulating times and modes of speech, manners of voting, etc., allows the rightful influence of mind upon mind to operate with the view of shaping individual wills and uniting them into one will, which will express itself in a law. Bentham's analysis of influence as operating from one mind on another, exercised from different sources of power (editors, POT, standing committees in the assembly, etc.), is akin to Foucault's theorization of biopolitics of the population. The part played by deliberative discipline in this process is nonetheless of interest. In Bentham, there seems to be a continuum between the use of disciplines and the influence of mind upon mind in a deliberative assembly, and in the whole of society, through the debates within the POT.

Conclusion

Indirect legislation aims to influence conduct. It does so by acting upon interests. The power of mind over mind is charted in Bentham through the concept of indirect legislation, and in Foucault, through that of biopolitics. This chapter bridges the gap between received interpretations of Foucault's view of the importance of law[133] and Bentham's indirect legislation. Indirect legislation is considered a key player in the field of biopolitics. By his analysis of constitutional modes of indirect legislation, Bentham clearly structured the scope of action of individuals involved in the political arena, either as governors or as governed. He could make his own, Foucault's statement that: 'To govern … means to structure the potential field of action belonging to others'.[134]

This chapter has traced the circulation of power in a political body. Both Bentham and Foucault share an interest in how power spreads, from the managing of society as a population (in the present case, a politically-aware population) down to the most insignificant instance of individual behaviour (as in the case of disciplines, be they panoptic or deliberative).[135] The main difference would be that Foucault ascribes the control of population to non-legal mechanisms, which he calls biopolitics, and Bentham considers them as a branch of legislation, albeit an indirect one. Laval highlighted this difference in perspective between the

two authors.[136] Notwithstanding this difference, I think the concept of biopolitical norm is relevant to understand the Bentham–Foucault relationship. It is contended here that the opposition is not to be taken at face value. It rests on different definitions of what constitutes a law. As seen in the previous chapter, Bentham defines a law as the expression of the will of the sovereign.[137] His definition includes as laws all types of expressions of the will, which would be enforced by an officer of the executive or of the judiciary in the case of disobedience. For Bentham, the order of the employer to the employee, the general to his soldiers, and so on, are laws, whereas they would not be construed as such by Foucault. This explains why Foucault's biopolitics is non-legal, whereas Bentham's influence of mind upon mind is part of indirect legislation.

The opening quote to this chapter underlined the secret workings of indirect legislation. In several instances, Bentham uses the metaphor of secrecy to describe the operations of this branch of legislation. This statement seems to contradict the requirement of publicity which runs through his writings on the subject. However, in Bentham, as in Foucault, the conduct of conduct, if not a secretive operation, is a less visible control of human action than laws, but nonetheless very efficient indeed.

PART III: THE BIOPOLITICAL EXPERT

INTRODUCTION: THE MORALIST AND THE ECONOMIST

Part II identified three ways in which conduct can be influenced: direct legislation, indirect legislation and private deontology. Here, the role of the utilitarian legislator needs to be distinguished from that of the utilitarian moralist.[1]

> To give increase to the influence of sympathy at the expense of that of self regard, and of sympathy, and of sympathy for the greater number at the expense of sympathy for the lesser number, – is the constant and arduous task, as of every moralist, so of every legislator who deserves to be so.[2]

In the study of ethics and economics, the spotlights are turned away from the concepts of 'conduct of conduct' and 'influence', and towards the concept of 'expertise'. Two experts are considered: the moralist (who is called 'deontologist' and 'parrhesisates' by Bentham and Foucault, respectively) in Chapter 5, and the economist in Chapter 6. Some questions are common to both players: who exactly are these normative authorities? From where do they derive their knowledge of norms? Why are their prescriptive statements obeyed? The underlying assumption is that both play a normative role in a biopolitical environment.

Norms play a central part in Bentham's ethics and economics since his principle of utility is an ethical and descriptive normative statement.[3] Law is to be distinguished from ethics in the sense that an act which is not conformable to utility is not necessarily a legal offence.[4] Basing an ethics on the individual pursuit of pleasure,[5] in which each individual is the best judge of their own pleasure, entails that any ethical normative statement is largely negative.[6] Notwithstanding the greater individual freedom of self-definition of pleasure, Bentham is ruthless with principles opposing utility.[7] He states: 'Principle of Utility allows no rival. Whatever is not under it is opposite it.'[8] However, the principle of util-

ity appears to be less dogmatic in its ethical statements. Contrary to other ethical standards which determine which actions are good or bad, utility allows for discussion on the morality or immorality of a given action by appealing to the external standard of the person's feelings of pain and pleasure.[9] Utility does not prescribe certain actions.[10] It gives the tools to decide whether certain actions are morally acceptable or not.[11] Normativity is in the tools imposed, not the actions prescribed. Conversely, economics is also normative, as it is grounded on the calculus of utility, which is normative per se.

Chapter 5 seeks to shy away from the traditional framework of the debate on ethics and to compare two figures which stand out in Bentham's and Foucault's ethics – the deontologist and the *parrhesisates*. This study allows us to measure the gap between individual behaviour and the utilitarian principle, by looking at Foucault's concept of conduct which challenges the relationship between choice and norm. The figure of the expert, as opposed to that of the political authority which promulgates coercive measures in Chapter 3, appears both as a moral authority and as an authority knowledgeable in the obscure workings of the economy.

There can be little doubt that Bentham's and Foucault's moral and economic advisors are indeed experts. This intuitive statement can prove difficult to demonstrate, especially if we want to compare the role of these moral advisors and economists with some accepted definition. There is no authoritative definition; or rather, there are as many definitions of expert as there are schools of thought. Pick any, and we will necessarily find one which will suit our purpose. This rhetorical exercise is not of interest here. Studies in the field of expertise have developed in relation to economics, rather than ethics, as ours is a knowledge-economy, the main interest of economics will be to generate knowledge, manage it and transfer it.[12] In this world view, the role of the expert is key to the growth of world economies. The expert is the one who will produce this knowledge, which is necessary to provide growth.[13] Analysis of the best environment to foster circulation of knowledge will entail the promotion of certain types of organizational structures and social relationships.[14] Conversely, some critics argue that experts are no longer trusted as those who hold knowledge.[15] Others question the relationship between science and politics.[16] This last trend is represented in science and technology studies, which examine how society interacts with science and technology. In this discipline, the work of Harry Collins and Robert Evans is of interest as they leave aside the issue of the legitimacy of the expert to explore the question of the extension of the expert, studying the dissolution of the barrier between expert and layman.[17] They adopt a realistic approach to expertise, assuming real and substantive expertise, which challenges the relational approach, which grounds the legitimacy of the expert in the eyes of the attributors.[18] According to them, becoming an expert relies on socialization into the practices of an expert group.[19] Collins and Evans produced a periodic

table of expertise,[20] which has been heavily criticized by ethnosociologists for confusing expertise with skills.[21]

Notwithstanding the interest of these studies for economics, they fall short when it comes to moral expertise. Bentham's and Foucault's experts, if they are given a central position in the societies for which they are advocating, do have their roles clearly cut out for them. They cannot be analysed in the meticulous way in which science and technology studies researchers examine physicists, for example. Bentham and Foucault do not answer basic questions such as: what is an expert? How is an expert distinguished from the layman who is skilled to carry out every-day life tasks? Who decides who is an expert? How does one become an expert? How does one remain an expert? Their moralists are not part of a community of moralists, with shared knowledge and interests. Their moralists' advice is true, that is, it complies with the normative ethical standards set by society or utilitarianism; but how does the moralist reach that truth? Similarly, there is no provision for a community of economists or a school of economists (as there are provisions for a school of legislation in Bentham).[22] It is accurate knowledge of the utilitarian calculus, in the field of morals or in that of economics, which constitutes the legitimacy of the moralist's or the economist's statement. This moral authority is enmeshed in a double relationship to the past and to the future. Both need to analyse past events, extract the correct relationship between utilitarian calculus and outcomes, and apply the ratio to new events. Prediction is thus essential and constitutes the validity of the statement, both as to its authoritative and to its normative value. Its normativity cannot be assessed *in abstracto*, but needs to be constantly assessed as to outcomes.

Bentham's and Foucault's ethical expertise is not shared by the layman. The aim of the advice given by their moralists is to make each one of us a deontologist, a *parrhesiastes*, or an economist. However, as such, the layman and the politician are in need of moral guidance before achieving a mastery of ethical and economic norms which will enable them to become an ethical or economic expert in their own right. The only way to understand the relevance of Bentham's and Foucault's ethical and economic experts is to see that they are philosophers, and not just any philosophers, but rather philosophers in the likeness of Bentham and Foucault themselves. They are economic and ethical authorities, and this is the only specification of the term 'expert' that I will use, following Thomas Osborne.[23]

5 ARE THERE BIOPOLITICAL ETHICS?

> Philosophical *parrhesia* is thus associated with the theme of the care of oneself.[1]

> Ethics, in as far as it is the art of directing a man's own actions, may be stiled the *art of self-government*, or *private ethics*.[2]

Introduction

This book contends that both Bentham and Foucault were interested in systems that allow one first to govern oneself in order then to govern others – Bentham in the devising, and Foucault in the studying, of these systems. Although it cannot be said that Foucault was influenced by Bentham per se, similarities between their philosophies point towards the fact that Foucault's study of the techniques of Western liberal government focused specifically on one type of liberalism, the type that Bentham devised when he conceived of his utilitarian government. There were also striking similarities when grounding their advocacy for freer or de-penalized sexual acts on the sexual customs of Ancient Greeks, as I have shown in Chapter 1.

Given these common grounds, there are reasons to wonder if one could read Bentham's utilitarian ethical reform in terms of conduct of conduct. Here I will shift away from Foucault's earlier writings on discipline and later writings on Western liberalism to focus on his essays on Ancient Greek ethics, which he studied as an aesthetics of existence. I will also focus on his writings on sexuality (volumes two and three of *The History of Sexuality*) and his corresponding lectures at the Collège de France: *Le gouvernement de soi et des autres* which is partly reproduced in the Berkeley series published in *Fearless Speech*.

Applied to the field of ethics, this endeavour is no easy task. At first reading, Bentham's writings on ethics do not draw on Classical Greek ethics to build his new utilitarian set of moral rules. Indeed, he criticizes all types of ethics, including the Greek notion of *summum bonum*. Conversely, in his late writings Foucault's work draws almost exclusively on Greek ethics to extract and reshape a representation of sexual behaviour in Ancient Greece and Rome and to offer another way of building oneself as an ethical subject. This contradiction lies at

the heart of my argument and I will endeavour to overcome it in the following pages, showing that the source of inspiration is not at issue, but rather the ways in which their ethics are structured around the concept of the expert who promotes the conduct of conduct, which both writers share, albeit in diverging ways. To that extent, the comparative study of the figure of the deontologist and the *parrhesiastes* is key to understanding how this expertise of conduct operates at different levels in the ethical theories devised by the two philosophers.

Bentham's Utilitarian Ethics

As in all other parts of his philosophy, Bentham's ethics is rooted in pleasures and pains alone.[3] As a consequence, pleasure and pain are set as the only standards of right and wrong:

> Every act by which pleasure is reaped is good, if either no pain at all is the result of it, or if, pain being among its consequences, the magnitude of the sum of pain is less than that of the sum of pleasure.[4]

Of course, equating feelings of pleasure with value statements of right and wrong cannot fail to raise a certain number of issues. Is pleasure good? G. E. Moore was the first to pose the question.[5] However, while commentators are quick to identify pleasure with good, in *Deontology Together with A Table of the Springs of Action*, Bentham does not make pleasure a synonym of good.[6] The relationship between the two concepts cannot to be viewed as one of strict identity. It is a looser relationship, in which pleasure acts as the only universal and value-neutral tool to measure an otherwise un-measurable concept: goodness.

The discussions on Bentham's ethics will focus mainly, but not only, on his treatise on *Deontology*. The use of the term 'deontology' is unexpected, at a time when people wrote about 'morals' or 'ethics'. Bentham defines deontology thus:[7]

> Deontology, or Ethics (taken in the largest sense of the word), is that branch of art and science which has for its object the learning and shewing for the information of each individual, by what means the net amount of his happiness may be made as large as possible; of each in so far as it is dependent on his own conduct: the happiness of each individual separately being considered, and thereby that of every individual among those whose happiness is on this occasion an object of regard.[8]

In a world where Bentham considered the use of the terms 'morals' and 'ethics' skewed and polemical, and only served the interests of sinister interests, he needed to coin a new word to describe his value-neutral endeavour. Fully in line with his utility principle, the aim of deontology is to maximize happiness. Deontology deals with each individual's happiness and does not deal with aggregates, unlike utility as used by the legislator.[9] Deontology remains a branch of ethics. Apart from the strategic use of this new term, deontology needs to be

understood as censorial ethics,[10] that is, ethics describing the behaviour to which individuals should conform, as opposed to behaviour as it is. In the light of the previous chapters, deontology is clearly a normative science of individual behaviour. The point is of note and will be developed further.

Utility as a normative principle is not demonstrated by empirical evidence.[11] The principle is obvious, and Bentham would have claimed that anyone who tried to challenge it was deluded.[12] Is saying that individuals are motivated by pains and pleasures alone, the same thing as saying that they should be so? In other words, is Bentham committing a naturalistic fallacy, deriving an *ought* from an *is*, a normative principle from a fact?[13] It is not the purpose of this chapter to take part in this debate. Rather, this chapter contends that despite the shortcomings of Bentham's use of the utility principle in his ethical theory, the former still remains a valid framework to understand, assess and control human action.

Bentham's deontology has been defined as censorial ethics. What is the aim of this branch of ethics? Bentham does not completely set aside the term ethics. In *Limits of the Penal Branch of Jurisprudence Defined*, he defines it thus:

> Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view[14]

Deontology or censorial ethics, otherwise known as private ethics, aims at educating people to choose or conform to the type of behaviour which will maximize their long-term well-being in their private life,[15] that is, it is interested in exploring 'man's interests and duties in every walk of private life'.[16] The term of note is 'private', but what is private and what is public in Bentham's philosophy? There is but a fine line between them and it needs to be examined. In *Limits of the Penal Branch of Jurisprudence Defined*, Bentham explains what belongs to the realms of ethics and legislation, respectively[17] and shows to what extent private ethics and legislation are similar:

> Now private ethics has happiness for its end: and legislation can have no other. Private ethics concerns every member, of a community that can be proposed; and legislation can concern no more. Thus far, private ethics and the art of legislation go hand in hand.[18]

However, he also identifies the cases 'in which private ethics ought to interfere and, in which legislation ought not'.[19] His argument overlaps with what he established in *An Introduction to the Principles of Morals and Legislation* with regard to the cases where punishment is either useless or too onerous.[20] The basic tenet of utilitarian philosophy, and of legal reformers in the Enlightenment,[21] is that punishment should be proportionate to the offence. In cases where the punishment would be disproportionate to the offence, that is, it creates more

pain for the offender than the offence produced on the victim and society, punishment should not be imposed. This is the case Bentham explores both in the *Introduction* and in his writings on sex regarding sexual offences such as homosexuality.[22] If the individual's behaviour causes this individual to endanger his long-term happiness (to gratify his short-term pleasure), without causing any harm to another member of society, as in the case of some addictions,[23] then this is a case where punishment is unnecessary. However, since the aim of utility is to maximize individual happiness, Bentham's deontology steps in to teach the individual to calculate his long-term interest and desist from the short-sighted pleasure-giving activity. Bentham summarizes his point, stating that:

> These cases, it may be remembered, are of four sorts: 1. Where punishment would be groundless. 2. Where it would be inefficacious. 3. Where it would be unprofitable. 4. Where it would be needless.[24]

The realm of private ethics, which is ruled by censorial ethics, is limited but clearly defined as all that which does not belong to the realm of public ethics, the reserved field of action of the legislator. Bentham goes through the list of moral rules (prudence, probity and beneficence), to find that beneficence belongs only to the realm of private ethics:

> As to the rules of beneficence, these, as far as concerns matters of detail, must necessarily be abandoned in great measure to the jurisdiction of private ethics.[25]

As in the following chapter on economics,[26] Bentham builds a rhetoric which is poised between two contradictory poles: on the one hand, the individual is best judge of his own interest;[27] and on the other hand the principle of utility is set as the only rational principle to guide both public and private action.

First, interest, as assessed in terms of varying degrees of pleasures and pains, is also paramount in Bentham's ethical calculus. Bentham notes that it is never, to any practical purpose, a person's duty to do that which it is their interest not to do.

Second, the utility principle is paramount in Bentham's thought. Bentham criticizes any ethical principles other than his own, such as those promoted by the Ancient Greeks which hinged more specifically on the *summum bonum*, and also the ethical principles promoted by asceticism, by sentimentalism and by religions.[28] The only school which seems to escape his harsh criticism is that of the Epicureans, since it advocates the pursuit of pleasure.[29] Apart from fleeting comparisons with classical ethics, as seen above, unlike Foucault, Bentham's purpose is not to draw on the Ancient Greeks to build his new ethics but rather to found a rational system on his utilitarian principle. Commentators have argued that Bentham's ethics leaves no space for discussion: it is the totalitarian imposition of a single world view. However, Bentham left some place for argument concern-

ing the contents of the utilitarian rules, as Postema notes,[30] quoting Bentham in a manuscript source: 'Utility recognizes the rule as yet to seek'.[31] Utilitarianism is first and foremost a method,[32] which means it created a framework in which rules should be devised, rather than the contents of the rules themselves. This enables Bentham's criticism of other ethics to be put in perspective. What he criticizes are not their rules, but the way in which the rules were set, and leaves some scope for principles from other ethics to converge with the utilitarian rules, a point which will serve my purpose when I compare the ethics of Bentham and Foucault.

Bentham's endeavour is not without contradictions. The role of the deontologist seems to conflict with that of the legislator. There is a conflict within the double injunction to the legislator to follow the guiding principle that 'the less the sacrifice made of happiness, the greater is the quantity remaining',[33] and that to deontologist to help individuals maximize their happiness. In this respect, Bentham's categories, expounded in his *Introduction* are of note. There he opposes prudence to benevolence, and, in utilitarian terms, extra-regarding and self-regarding pleasure. Bentham notes:

> wheresoever the happiness of others is affected by the conduct a man pursues, his own happiness it will be shewn will in some way or other be affected by the manner in which theirs is affected by it.[34]

The purpose of utilitarian morality is not egoistical. The happiness of others is considered as an intermediate goal.

This overview of Bentham's position regarding other ethical traditions and the basic principles directing his ethics has led to a sketch of the specificity of his project. This chapter now focuses on the figure of the deontologist as an expert of practical morality.

As highlighted above, Bentham's ethical endeavour is fraught with contradictions. The same issues are raised in respect to the deontologist. What is his/her role if, in Bentham's words, 'Every person is not only the most proper judge, but the only proper judge of what with reference to himself is pleasure: and so in regard to pain'?[35] This statement implies that the rulings of the deontologists are not coercive, but advisory to all individuals. The deontologist is not a legislator, he has no political power (contrary to the political deontologist). His realm is not that of the physical, political or religious sanction (contrary to tyrants and religious leaders) but that of the moral sanction. His means of action are words, written or spoken, to persuade people to adopt certain types of behaviour.

The grounds for the deontologist's intervention rest on the assumption that individuals get their utilitarian calculus wrong – otherwise there would be no more scope for Bentham's utilitarian government – and this justifies the role of

the legislator and of the deontologist. The role of the latter is to help people choose the right aims to maximize pleasure and minimize pain:

> Of the practical moralist what then is the proper function? For the use of each man to lay before his eyes a sketch of the probable future more correct and compleat than, without the benefit of such suggestion, inflamed by the view of present or speedy pleasure or pain, men's appetites and passions will be apt in general to suffer them to draw for their own use: to assist them in making reflections and drawing comparisons – in taking a correct and compleat account of the past – and from thence in drawing inferences and forming eventual calculations and eventual conjectures in relation to the future; thereby to assist them – in the first place in the choice of subordinate, i.e. particular, ends – in the next place of the means through which the obtainment of those pleasures respectively shall be aimed at; of particular ends, i.e. in regard to pleasure, the choice of the species of pleasures to be sought after and of the situations in which and occasions on which each pleasure shall be reaped; in regard to pain, the choice of the species of pains most studiously to be avoided.[36]

Practically speaking, the deontologist's role is to show obscure, neglected points of coincidence between interest (self-regarding interest/self-regarding prudence) and duty (extra-regarding interest/probity and beneficence):

> What then is the business of the Deontologist? In every instance to bring out of their obscurity, out of the neglect in which they have hitherto in so large a proportion been buried, the points of coincidence to the extent of which extra-regarding interest is connected and has by the hands of nature been identified with self-regarding interest: and this in such sort and with such effect that by the alliance thus formed, by this conjunct kind of interest, the force of self-regarding interest in those shapes in which it is purely self-regarding is commonly already in use, and by apt means may be rendered more and more in use, to be outweighed and overpowered. In this way it will, it is believed, be found that for this species of artist there is no want of work. Nature has provided no inconsiderable quantity of useful work which as yet remains unattempted, and thus it will be his own fault if his office be a sinecure.[37]

Deontologists have the benefit of hindsight and foresight in order to persuade people to look beyond the immediate gratification of their pleasures to reap even greater pleasures in the future.[38] They are experts in the consequences of one's acts:

> Of that which has presented itself as the proper office of the deontologist an indication has been already given: in itself it is neither more nor less than that of a scout; a man who having put himself upon the hunt for consequences, for such consequences of a particular kind as have been found apt to result from a particular species of course, collects them as he can, and for the use of those who feel themselves disposed to accept of his services, spreads them out in their view. In this mode of executing the office, how much there is of labour, how little of self-assumed importance, let any one judge.[39]

The main skill of the deontologist is to forecast the future course of events from past experience, thereby locating himself/herself within a stable pattern of

cause–consequence relationship, always taking in all new circumstances which could disrupt and skew this pattern. Bentham calls the deontologist a 'scout'. Could his definition of a scout be more akin to that of an expert than a hunter? Is the deontologist an ethical expert? This chapter now turns to the figure of the *parrhesiastes*, before exploring Bentham's and Foucault's moral experts in the field of the science of normative ethics.

Deontology is a new ethical science which is first and foremost a methodology based on the utilitarian operations of the moral calculus. In Bentham's own words, it is an economy of a stock of happiness.[40] This new and innovative way of viewing ethics is strongly set against traditional ethics, among which are the Greek ethics on which Foucault bases his arguments. As explained above, there does not seem to be any coincidence between Bentham and Foucault. However, when it comes to ethics, as in many other fields, there is more convergence than meets the eye. The figures of both the deontologist and the *parrhesiastes* establish themselves as different from moralists belonging to past generations. Bentham's statement that 'very different is the mode in which [the deontologist's] office has with few if any exceptions been hitherto exercised'[41] is mirrored by Foucault's comment about 'the problem of determining the indubitable criteria which enable us to distinguish the genuine *parrhesiastes* we need so badly to rid ourselves of our own *philautia* from the flatterer who "plays the part of a friend with the gravity of a tragedian"'.[42] This common endeavour to distance oneself from previous moral standards is the starting point for considering a similar goal for their ethics.

Foucault's Ethics

Foucault's work on ethics is based on his study of classical philosophy.[43] It revolves mainly around the concept of the *parrhesia*, which is performed by an individual called *parrhesiastes*. The operation of *parrhesia* is expounded in *Le governement de soi et des autres*, translated and reproduced in part in *Fearless Speech* (and also in the moral dilemma concerning the love of boys to be found in volumes 2 and 3 of *The History of Sexuality*, but this issue is not within the scope of the argument posited here).

Foucault identifies two periods during which the concept of *parrhesia* evolved.[44] The figures belonging to the respective periods are roughly divided into the democratic *parrhesiastes* and the monarchic *parrhesiastes*.

Foucault identifies a first generation of *parrhesiastes* before the fourth century BC. This moralist is endowed with some distinctive characteristics. He is someone who speaks the truth[45] to someone more powerful than himself.[46] Foucault writes: 'The *parrhesiastes* is not only sincere and says his opinion, but his opinion is also the truth'.[47] Foucault gives examples of contexts where one can find *parrhesia*: when a philosopher addresses himself to a despotic ruler, a citizen to the

majority, a pupil to his teacher.[48] Notwithstanding this difference in power-relations between the *parrhesiastes* and the individual or group he addresses, there is a relation of proximity between the advisor and the advised, as Foucault explains: 'Socrates' interlocutor must get in touch with him, establish some *proximity* to him in order to play this parrhesiastic game'.[49] This relationship is requisite to ensure that the *parrhesiastes* takes the risk of being punished for his advice.[50] The element of risk lies at the heart of what it means to be a *parrhesiastes*:

> when a philosopher addresses himself to a sovereign, to a tyrant, and tells him that his tyranny is disturbing and unpleasant because tyranny is incompatible with justice, then the philosopher speaks the truth, believes he is speaking the truth, and, more than that, also takes a *risk* (since the tyrant may become angry, may punish him, may exile him, may kill him).[51]

By acting as a *parrhesiastes*, the advisor and the advised enter into a 'parrhesiastic contract': 'I tell you the truth, but you will not punish me for it',[52] a contract which always runs the risk of being broken by a displeased power-holder:

> This is the idea that the 'parrhesiastic contract' became associated with *parrhesia* as a special privilege granted to the best and the most honest citizens of the city ... This 'contract' is intended to limit the risk he takes in speaking.[53]

In Greek culture at the time, this means that only a male citizen, that is, one enjoying his full civil rights, can act as a *parrhesiastes*.[54] Being a male citizen, however, is far from being the only requirement for becoming a *parrhesiastes*. In addition, the individual claiming this status must have moral and social qualifications.[55] One profession disqualifies him for the title: he cannot be a professional politician.[56]

This is an important point, because it allows us to consider the relationship between Bentham's and Foucault's ethics. In both cases, their moralist is set aside from the politician, thereby creating a divide between the private and the public realm, and between the fields of ethics and legislation in Bentham's system.[57] In Foucault's theory, the problem is set in different terms. The divide is not between ethics and legislation, but between truth and politics. From where does the *parrhesiastes* speak? From a moral point of view or not? Bentham solves this issue by exploring the following set of questions: (1) To what extent are deontology and the art of legislation different? (2) Because of the principle of utility, do they not have the same structure? and (3) Is the legislator not a deontologist? As regards Foucault's *parrhesiastes*, the question is to ask whether the *parrhesiastes* allows the separation of ethics and politics? The characteristics of the *parrhesiastes*, described above, lead to the identification of a strong relationship between language and truth (what Foucault would call logos and truth). Foucault writes: 'The ... characteristic of *parrhesia*, then, is that there is always an exact coinci-

dence between belief and truth'.[58] Indeed, when there is *parrhesia* in the positive sense, wisdom increases.[59]

Foucault pinpoints the rise of the empire in the fourth century, which challenged the traditional structures of Greek urban society and democracy, as triggering a change in the character of the *parrhesiastes*. The main concern with the type of *parrhesiastes* described above is that there were doubts as to whether one could actually talk of *parrhesia* when there was a real democracy.[60] Real *parrhesia* could only exist fully when the *parrhesiastes* was confronted with an all-powerful tyrant, so that risk-taking, essential to his definition, was effective. In a real democracy, the *parrhesiastes* did not necessarily put his life on the line when he gave advice to a ruler. In a monarchy, with an all-powerful tyrant, the stakes of giving unflattering advice to the ruler were higher.

Foucault identified a second generation of *parrhesiastes* after the fourth century BC. The characteristics of this second *parrhesiastes* are roughly the same as the first generation, but with some differences. The *parrhesiastes*'s intellectual competence is no longer an essential criterion. The relation of proximity between advisor and advised is not necessary, but the *parrhesiastes* has to be neutral to be a good advisor.[61] The main divide created by *parrhesia* is not between logos and truth but between logos and bios, that is, considering language as a means to reach a fulfilling form of existence.[62] There is a higher purpose to the advice to the ruler. The aim of the *parrhesiastes* is to make the tyrant alter his belief in order to change his lifestyle. This will have a direct effect on his relation to others and to himself.[63] The main contention underlying this argument is that one must know the truth about oneself in order to know the truth: 'The circle implied in knowing the truth about oneself in order to know the truth is characteristic of the parrhesiastic practice'.[64]

When there is monarchic *parrhesia*, these characteristics highlight a strong relationship between logos and bios: a consistency between what is said and what is done.[65] When advising the king, one is making a strong choice about one's bios;[66] therefore choosing to be a *parrhesiastes* is not only choosing the freedom to speak out, but also the freedom to determine one's lifestyle. Indeed, to be persuasive, one's deeds should be consistent with one's teachings.

All ethical principles are based on norms. Notwithstanding Foucault's denial of normativity in Greek ethics[67] and the absence of reference to any norms, the *parrhesiastes*'s discourse is also normative. However, here it would be difficult to pinpoint in one maxim the norm imposed by *parrhesia*. The aim of the action of the *parrhesiastes* is to form a good ruler, by educating a good individual. This will depend on the norms imposed by the community in which the ruler lives, and at the time in which he lives. The question the *parrhesiastes* raises is whence his legitimacy to guide behaviour according to certain rules arise? This is the issue of the legitimacy of a moral expert, which will be addressed later on in this chapter.

This presentation of the characteristics and functions of the deontologist and the *parrhesiastes* in society has highlighted some differences between utilitarian and Greek ethics. However, a closer study can show similarities and differences between both actors.

The Deontologist and the *Parrhesiastes*

There is some striking common ground between these two figures, to such an extent that it is possible to say that the deontologist is a type of *parrhesiastes*. The first common point relates to the value of the advice given. Contrary to other moralists, the deontologist and the *parrhesiastes* are not paid in reputation or from the profit of the sale of their work.[68] Second, the intention of the advice given is not to run with the flow, but to go against public opinion, if necessary.[69] Third, as regards the power-relations involved in the advice-giving operations, in both cases, notwithstanding the fact that the deontologist and the *parrhesiastes* are neither weak, foolish nor ignorant, their voices, aside from offering sound advice, are not imbued with external power.[70] This means that legal or political coercion is not the means used to be obeyed. Resort to political sanction is not available. At best the moral sanction could operate to incite the advised to follow the suggestions of the advisor. Fourth, the advice is not necessarily on the side of severity,[71] since the aim is not asceticism for the sake of asceticism but to reach a higher understanding of oneself, in Foucault's exegesis, or to comply with the principles of utilitarianism. Fifth, both show a strong relationship to the truth. The deontologist's words are the truth, because in Bentham's theory, what complies with utility is true and good. Truth and logos are also the key to understanding the role of the *parrhesiastes* and the risk he takes in speaking out.[72] Sixth, both characters wish to position themselves in stark opposition to a certain use of rhetoric, whose aim is to wield power in the hands of the advisor. As Foucault explains, 'the difference [is] between the *logos* which speaks the truth and the *logos* which is not capable of such truth-telling'.[73] Both advocate a competing use of language, based on utility for one and on *parrhesia* for the other.[74]

There are, however, differences between the deontologist and the *parrhesiastes* that cannot be overlooked, to such an extent that the deontologist can be construed as an anti-*parrhesiastes*. Indeed, the first aim of the *parrhesiastes* is not the maximization of pleasure, but rather the set of norms established by the society of the advised.[75] Passions, not pleasures, is the key term in Greek ethics. Whereas the role of the *parrhesiastes* is to free oneself from one's passions.[76] Bentham does not speak in terms of passion, but some un-utilitarian acts comprise acts which fall within the scope of passions. The consequence for the advisor is to increase the advised's fund of goodwill, in Bentham, but, in Foucault, the advisor risks increasing his pain over his pleasure.[77] Indeed, as seen above, the risk the advisor takes

is essential to the concept of *parrhesia*. Without risk (i.e. to increase one's pain over one's pleasure) there is no *parrhesia*. In this sense, the deontologist and the *parrhesiastes* cannot be further apart. Their methods differ, since Bentham counsels the deontologist to accommodate the advised's feelings by non-conflicting techniques[78] while Foucault states that giving unflattering advice to the king can put the *parrhesiastes*'s life at risk.[79] Bentham strikingly writes in a comment which contradicts any attempt to analyse the role of the deontologist as coercive that:

> If you serve him as you think, or say in a way which is yours and not his, the value, if any, of the service may by an indefinite amount be thus reduced. If the notion of serving a man not in the way in which he wishes to be served but in the way in which he ought to be served or the way in which it is best for him to be served be carried to a certain length, this is tyranny not beneficence: an exercise of power for the satisfaction of the self-regarding affection, not an act of beneficence for the gratification of the sympathetic or social affection.[80]

The last striking difference is that the deontologist gives impersonal opinion based on utilitarian calculus, whereas the *parrhesiastes* is the one who says 'I am the one who thinks this and that'.[81]

The common grounds, if any, are not to be found in the characteristics or the method used by Bentham's and Foucault's moralists, but in the purpose their advisors wish to achieve. One must put Foucault's late study on Greek ethics into perspective with his life-long study of clinical techniques of self-surveillance (from *The Birth of the Clinic* in 1963 to *Discipline and Punish* in 1975, then expanded into the concept of governmentality).

Conduct of Conducts: From Norms to Expertise

Foucault places the discourse on *parrhesia* within the wider scope of the concept of the care of the self, as shown in the preliminary quotes to this chapter. He defines the care of self as an aesthetics of existence, that is, in his own words, 'the formation of the self through techniques of living'.[82] The care of self is part of the wider-encompassing concept of clinical techniques of self-examination.[83]

One of the guiding principles of self-examination is to recover self-mastery.[84] This is achieved through stability of mind, exclusion of flow of representations one cannot control, and so on.[85] The second is that there is more to it than just the principle of 'know thyself'.[86] The third element is that what is at stake is a relation of the self to truth (or some rational principle).[87] These three points constitute the aesthetics of the self, which Foucault defines thus:

> One can comport oneself towards oneself in the role of a technician ... who from time to time stops working, examines what he is doing, reminds himself of the rule of his art, and compares the rules with what he has achieved so far.[88]

Foucault's analysis of the *parrhesia* encompasses ethical behaviour which goes beyond seeking the relationship to truth, as in classical Greek ethics. He envisages a use of *parrhesia* which could include the relation of the self to another rational principle, such as utility. He writes: 'What is at stake is the *relation* of the self to truth or to some rational principle'.[89] Here, of course, the key term is 'relation'. It implies three elements: a self; a principle, which acts as a hallmark, and a changing relationship of proximity and identification between the first two entities. This relationship is envisaged from the point of view of a technique. Foucault writes: '[u]tilizing our modern vocabulary, we can say that navigation, medicine, and the practice of *parrhesia* are all "clinical techniques"'.[90] This technique is a form of self-examination, whereby the individual is constantly assessing the relation of the self to the ethical principle.[91]

When one speaks of self-examination in relation to Bentham, it triggers the image of the Panopticon. As mentioned in the introduction to this volume, I have decided to omit the panoptic interlude, which has already been extensively mapped,[92] in order to highlight uncharted areas of convergence between Bentham's utilitarianism and Foucault's thought on modern power. Here, of course, the Panopticon is the most graphic example of Bentham's endeavour to teach individuals to control themselves.[93] Bentham's surveillance techniques are of two types. The first is institutional surveillance, that is panoptic discipline or any other institutional mechanism which controls, limits and channels the power of governors and ensures the compliance of the governed.[94] The second is individual surveillance. These institutional surveillance mechanisms force individuals, governors and governed alike, to internalize the behaviour that is required from them.[95] Bentham's panoptic techniques of mechanized and then internalized self-examination are extended across his theories of the reform of society.[96] It is not only in the Panopticon that the individual is controlled and taught to behave according to the best possible utilitarian calculus, but in all of Bentham's endeavour. The deontologist, whose aim is to conduct the conduct of others, is a fitting example of the operations of social control at work in utilitarianism. When one knows that the sphere of the deontologist is only that which lies outside the scope of the legislator – where his action would be groundless, inefficacious, unprofitable or needless – one understands better how Bentham aimed to conduct conduct at all levels of society.

What is of interest here is that techniques of self-examination are operative beyond the walls of the utilitarian institution of punishment, reform, education and production. If the panoptic inmate is taught to internalize utilitarian behaviour and methods, the scope of utilitarian conduct reaches beyond the walls. This can be seen in the action of the legislator, the schools of legislation and the action of indirect legislation, in all of which the deontologist plays a part at an individual level. (Self-)Discipline is akin to self-examination in Bentham's

writings. Bentham wishes to teach individuals to behave themselves rationally, following a rationality based on utility.[97] He also wishes to control rulers so that they do not usurp their powers,[98] but also so that they might internalize the behaviour that is expected of them. Here, the point is not only to control oneself, but to control oneself so that one might control others appropriately. Where Bentham's deontologist targets both the governors and the governed, Foucault's *parrhesiastes* has a privileged relationship with the ruling few,[99] and only indirectly with the subjected many.

Here, focus is on the paired figures of the deontologist and the *parrhesiastes*, rather than on the related concepts of deontology and *parrhesia*. The reason for this lies in the fact that studying the players, rather than the concepts, would naturally raise the issues of how the moralist acquires his knowledge and from where his legitimacy as a moralist arise.

The question of who the deontologist and the *parrhesiastes* remains unanswered. The main assumption here is that they are moral experts. The introduction to Part II defined the expert as an authority. Where does this authority spring from? The deontologist's authority springs from his ability to predict future events, based on an accurate use of the utility calculus, while that of the *parrhesiastes* comes from his conviction that the nature of the advice he gives the ruler is worth his very own life. How do the deontologist and the *parrhesiastes* become experts in the science of normative ethics?

Unfortunately neither Foucault nor Bentham suggest an answer. However, for the latter the scholar can draw some inferences from other fields. Bentham briefly toys with the idea of a school of legislation to teach students how to write laws according to utilitarian method and principles. He writes:

> When these rules and exercises were prepared and brought into order, a sort of school might be established of which the business should be to teach, not the art of forensic disputation for the emolument of individuals, but the art of legislation for the benefit of empires.[100]

For the children of the rising middle classes, Bentham was thinking of a school where pupils would be taught useful subjects.[101] More important than the instruction gained, what Bentham aims to do is shape the young minds of his wards. He explains:

> Giving to the youthful minds habits of order applicable to the most familiar, as well as to the highest purposes: good order, the great source of internal tranquillity and instrument of good management.[102]

And for the less fortunate parts of the population, the Panopticons would provide re-education, teaching inmates the benefits of long-term utilitarian calculus.[103] Bentham's schools seek to mould the minds of his wards, so that they can each act

as deontologists in their every-day lives. However, if the main assumption is that deontologists are incorruptible and infallible, individuals might want to turn to their enlightened advice in times of need or doubt. The problem is that schools of utility to teach the young masses do not explain how one becomes *the* deontologist or *the parrhesiastes*.

Legal and extra-legal norms have been dealt with extensively. Ethical principles, as advocated by the deontologist and the *parrhesiastes*, are extra-legal norms which aim at controlling behaviour. For both Bentham and Foucault, this norm lies in the space-to-the-norm itself. It is very clear in the case of the *parrhesiastes*, who moulds himself in the moral requirements of a given society; it is less so in Bentham's case, where the overwhelming presence of the concept of utility overshadows the fact that utility is a methodology whose contents, means and aims can be discussed within the scope of this rationality. I contend that both the deontologist and the *parrhesiastes* are moral experts: they are endowed with the legitimacy to set moral norms. However, the example of the school and teaching ethics is unable to account for the origin of the moral expert's authority. Bentham's and Foucault's experts cannot be understood without taking into account the model of Plato's philosopher king to whom they both relate. At the level of the state, the requirements of Plato's philosopher king are the same as those of the individuals addressed by the deontologist and the *parrhesiastes*: the advisors must know how to order laws so that their will be good; they must be truthful; and their desires should be channelled towards truth and not power.[104] As in Foucault, there are outer signs that one is complying with the advice of the *parrhesiastes*, since one is just and gentle as opposed to rude and unsociable. As Thomas Osborne has noted, Foucault's aesthetic, as a way of life, is not a 'celebration of a politics of individual dandyism'.[105] Here, what strikes the reader is that both Bentham and Foucault investigate a means to offer an ethics which will reform politics and society. In the field of ethics, this figure is none other than the philosopher.

The deontologist and the *parrhesiastes* are agents to encourage individuals to reinvent themselves as normative individuals, in Legrand's sense.[106] Norms are inherent in the moral expertise of both authors. But this need not mean that norms are fixed and unchanging. In Legrand's analysis of Foucault's norms and in Bentham's view of utility, what seems to be the unflinching hallmark of conduct (classical ethics of how one should behave or utility) turns out to be that which produces subjectivity:

> Rather than subordinate oneself in the name of an external code, truth, authority or goal, such a politics would operate under a different slogan: each person's life should be its own telos. It would thus have its own minimal normativity: we should oppose all that which stands in the way of life being its own telos.[107]

Ethics is the domain where individuals relate to themselves and transform themselves.[108] Bentham's and Foucault's examination of the role of ethical normativity to shape one's subjectivity is intertwined with the role of the individual in society, as a located interest or as a ruler. Ethics at the level of the individual subject is used in both theories as a springboard to offer a new society.

Conclusion

Bentham and Foucault share a common goal in their ethical writings: that of challenging established ethical standards in order to create an ethics based on the conduct of conducts.

The means they use to achieve their ends is nonetheless different. Bentham sets the foundations on strict utilitarian grounds, seeking to maximize pleasure and minimize pain, rejecting any ethics other than his own. Foucault criticizes the ethics of modern day society by studying classical morality, thereby highlighting the differences between the values at the time at which he was writing and that of classical Greece. Bentham and Foucault both seek to keep their distance from the morality of their contemporaries; as a consequence, the moralists they create share common traits. Nonetheless, because their starting point is different, the comparison between the two ethical figures of the deontologist and the *parrhesiastes* cannot be extended beyond a certain point and the concept of biopolitical ethics is not relevant here to understand the Bentham-Foucault relationship.

However, the strong link between Bentham's and Foucault's endeavours comes with the clinical techniques of self-examination, which are taught and enforced (through various technologies) in order that individuals might control themselves in a way which is consistent with what their environment requires from them, and so that individuals in the position of governors do not abuse their powers.

The most striking common ground remains that Bentham and Foucault very clearly cast themselves in the roles of the deontologist and the *parrhesiastes*, respectively. Indeed, Bentham wanted to be 'despot of the moral world', thanks to his 'Deontology private or Morality made easy'.[109] Both the deontologist and the *parrhesiastes* are philosophers who are there to teach us to transform ourselves.

6 POLITICAL ECONOMY AS THE *REPUBLIC OF INTERESTS*[1]

> Dans l'économie politique, le grand secret est de rien faire. Il faut l'étudier parce qu'elle est très intéressante comme science, mais plus on l'étudie, plus on voit qu'elle est malfaisante comme art.[2]

> We have then the conditions for the creation for a formidable body of legislation and an incredible range of governmental intervention to guarantee the production of the freedom needed to govern.[3]

Introduction

While recognizing the interest of political economy as a science, that is as a stock of knowledge, Bentham denies the possibility for government to use it as an art to control the market. Government intervention in economic life is seen as having a negative impact. Foucault, on the other hand, explains the reasons why the eighteenth- and nineteenth-century consensus of laissez-faire economics was accompanied by breathtaking legal, political, medical and educational interventions.[4] For him freedom is not a given in a government based on the transaction of the interests of collective and individual utility.[5] It emerges thanks to the limitations, safeguards and checks imposed by government. The quotes above encapsulate the contradictions at the heart of a form of liberalism, theorized by Bentham in his economic writings,[6] and later analysed by Foucault. The subtle interaction between economics and government, in the government rationality emerging during the period in which Bentham was writing, is presented by Foucault as still presiding over our biopolitical world.[7]

If the quotes above highlight a position common to Bentham and Foucault, law continues to divide them. As we all know, the position of Bentham as an economist has generated many contradictory descriptions.[8] The reason for this lies in the pervasive nature of legal mechanisms in his theorization of economics. Law is used to set the framework for the market and then acts as a means to regulate it. In Chapter 4, I showed how the conduct of conduct was controlled in Bentham through a branch of the law known as indirect legislation.[9] This

inclusion of the means of social regulation within the scope of the law seems to place Bentham in stark opposition to Foucault.

Foucault suggests dividing the history of the art of government into three eras. This division is not strict, in the sense that these eras should not be viewed as successive, but concomitant, and the relative importance of each period's rationality differs from one to another. First there is the era of sovereignty, in which the *raison d'État* imposed external limitations on the acts of the sovereign, the issue being the legitimacy of the acts of the sovereign.[10] Then there is the era of disciplines, in which the growing policing of populations could only be limited by an external principle of limitation (such as the theory of imprescriptible natural rights or the theory of contract).[11] The third era is that of biopolitics, in which the limitation is internalized by individuals.[12] However, it is not the law that regulates this new governmental rationality, but political economy.[13]

For Bentham, there is no such thing as natural economic laws, which would guide government policies. As Laval aptly explains:

> For Bentham, laws are commands issued by the Sovereign, rather than regular patterns which can be observed in economic activity. If some laws may have a more specifically economic impact, for Bentham laws constitute an interdependent body of law which have an effect on economic life ... As regards political economy strictly speaking, which focuses on wealth only, it is considered as part and parcel of the economics of pains and pleasures which underlies the *Pannomiom*.[14]

Foucault, on the other hand, clearly ruled out any action of the law in the limitation of government. He argues that:

> this fundamental transformation in the relations between law and governmental practice, this emergence of an internal limitation of governmental reason could be located roughly around the middle of the eighteenth century ... the intellectual instrument, the type of calculation or form of rationality that made possible the self-limitation of governmental reason was *not the law*. What is it, starting from the middle of the eighteenth century? Obviously, it is political economy.[15]

However, as previously highlighted, the contradiction is only apparent and is dispelled when the meaning of the term 'law' as used by both authors is analysed as illustrated in Chapter 3 of this volume.[16] Bentham's legal mechanisms are biopolitical in essence, since he brings the government of conduct within the scope of the law, under the heading of indirect legislation.

Therefore, it will not be surprising that the purpose of the present chapter is to show that Foucault's biopolitical government rationality finds its fullest expression in the English utilitarians,[17] of which Bentham is the purest representative. This biopolitics is to be distinguished from the era of sovereignty in that it regulates population, rather than territory, and in that it is absolutely

framed by a radical approach to public law.[18] In order to argue my point, I will unravel the complexities of the junction of economics and government in the eighteenth century[19] and show that this rationalization is the meeting-ground of Bentham and Foucault. Incidentally, I shall show the nature and source of economic expertise, and highlight that thorough knowledge of economic phenomena is the basis of the authority of the expert.

Economy as a 'technology of government'[20]

The relationship between English utilitarianism and Foucault's concept of biopolitics, although unmapped up till now, is in fact quite obvious.[21] Foucault identifies two ways in which, historically, political philosophy has limited the exercise of power by a public authority. First, there is the axiomatic, juridico-deductive approach, which is exemplified, from a theoretical perspective, in Rousseau's thought,[22] and from a practical point of view, in the rights-based approach in the French and American revolutions. This approach identifies unalienable human rights and defines conditions under which the limitations or exchange of rights could be permissible.[23] Second, there is the inductive and radical approach, which starts with government practice and how it can be limited de facto.[24] In this approach, '[g]overnment's limit of competence will be bounded by the utility of governmental intervention'.[25] According to Foucault, historically speaking the regulation of public bodies in terms of utility takes precedence over the axiom of rights.[26] On this assumption, any analysis of the contemporary roles and status of neo-liberalism in twentieth-century politics is bound to follow the second approach, which has won the day.[27] In the long-run, any limitation of government action thus has to be based on the calculus of utility.[28]

Why is the limitation of government action so essential to defining liberalism and its followers as neo-liberalism? Foucault defines liberalism very broadly:

> 1. Acceptance of the principle that somewhere there must be a limitation of government and that this is not just an external right.
>
> 2. Liberalism is also a practice: where exactly is the principle of limitation of government to be found and how are the effects of this limitation to be calculated?
>
> 3. In a narrower sense, liberalism is the solution that consists in the maximum limitation of the forms and domains of government action.
>
> 4. Finally, liberalism is the organization of specific methods of transaction for defining the limitation of government practices:
>
> – constitution, parliament.
>
> – opinion, the press.
>
> – commissions, inquiries.[29]

Liberalism is to be understood as a mode of government which limits its action, both in principle and in practice. This is far from a neutral definition. There are many definitions of liberalism in circulation, especially those which stress the role of freedom as an essential component of liberalism.[30] Foucault's adoption of a definition that lays emphasis on limits conditions a reading of the birth of modern-day government rationality as springing from the utilitarian tradition.

The definition above begs the question: how is a government going to limit its action? Foucault answers the question: a government is limited by the principle of truth.[31] One question brings forth another: what is truth in this context?

The objective of political economy is to contribute to the state's enrichment, both in creating the appropriate conditions for the population to reproduce and in helping to increase the means of subsistence.[32] These objectives can then be assessed as to their effects.[33] It is no longer the issue of legitimacy of government action which is at stake, but rather its success or failure.[34] Here Foucault is quick to identify the utilitarian roots of such assessment of government:

> In other words, there will be either success or failure; success or failure, rather than legitimacy or illegitimacy, now become the criteria of governmental action. So, success replaces [legitimacy]. We touch here on the whole problem of utilitarian philosophy, which we will have to talk about. You can see how utilitarian philosophy will be able to plug directly into these new problems of governmentality.[35]

Indeed, a government will no longer be deemed good or bad on account of its wickedness or its illegitimacy, but on account of its ignorance.[36] Ignorance of what? Ignorance of the means to reach the objectives set to a good government, that is, to increase the well-being of its population. The testing ground of the new government rationality emerging at the turn of the nineteenth century is the issue of truth. The practice of *regimes* of truth is enmeshed in the power/knowledge dyad Foucault has analysed in different settings.[37] This truth is the economic truth.

Let us not beat about the bush. The site of the economic truth is of course the market. The market acts as rule and norm of government action. Foucault explains that the site of truth:

> must be left to function with the least possible interventions precisely so that it can both formulate its truth and propose it to its governmental practice as rule and norm. This site of truth is not in the heads of economists, of course, but is the market.[38]

The market has a long history of having a social and political function in society. In the Middle Ages, the market was a site of jurisdiction, that is it had to ensure that the distribution of goods be as fair as possible.[39] In the middle of the eighteenth century, the market took on a different role and became a site of veridiction, that is it expressed the relationship between cost of production and demand for a given good.[40] By veridiction, Foucault means the validating

mechanism that determines whether or not a statement is true. The first type of market was achieved through regulation, the second through spontaneous mechanisms.[41] On account of the transformation of the market into a site of veridiction, the principle that governments should be limited in their action is grounded on the fact that prices are set in accordance with natural or spontaneous mechanisms, and not thanks to external regulation.[42]

Since the site of veridiction is the market, which is entirely governed by spontaneous action, the government's aim should not be to intervene in economic life but, on the contrary, to refrain from intervening. A government in this predicament lives by the motto of 'frugality', which was theorized in the eighteenth century.[43] Foucault goes as far as to identify frugality as the main operating principle in liberalism:[44] '[The] question of the frugality of government is indeed the question of liberalism'.[45] This is a central point since the concept of frugality was also theorized by Bentham.[46] The problem is that the issue of frugality is fraught with contradictions since, in order to set the conditions for the emergence of a free market, a government needs to extend its intervention.[47] These intrusions can be compared with what Foucault calls 'liberogenic' devices which, instead of producing freedom, produce the opposite.[48]

By what mechanisms will it be possible to leave the market free? This is when the law steps in to guarantee a free economic playing ground. Foucault phrases the issue as follows:

> In spite of everything it is always a juridical limitation, the problem being precisely how to formulate this limitation in legal terms in the regime of this new, self-limiting governmental reason.[49]

Public law appears as a means to limit the power of public authorities, especially their power of interfering in the market.[50] Historically speaking, the concerns of public law shift away from examining the conditions of a sovereign's legitimacy to the determination of the limits of the exercise of their power.[51] We have seen above[52] that this redefinition of the scope of public law took two diverging directions (the rights of man and the utilitarian calculus). The second of these directions has taken over the actual practice of government. It offers an inductive rationale of government, which starts with practice in order to identify limits.[53] The good limits are defined by the objectives of government. These objectives are of course related to the objectives of government, which are resources, population and economy. The limits of government are linked to the best possible outcome in relation to its objectives, using the *agenda/non-agenda* divide.[54] The guiding line of the government's self-limiting truth is what to do or not do in relation to a government objective. Foucault sums up this principle in the following passage:

> The problem, therefore, is not: Where are the basic rights, and how do they separate the domain of fundamental freedom from the domain of possible governmentality? The dividing line is established between two sets of things that Bentham listed in one of his most important texts ... the division between the agenda and the non-agenda, between what to do and what not to do.[55]

The utility of a measure is the measuring rod of government practice. It is the calculus of utility which acts as a brake on the expanding nature of government.[56] Using the terminology of utility, Foucault explains that:

> government's sphere of competence will be defined on the basis of what it would or would not be useful for government to do or not to do. Government's limit of competence will be bounded by the utility of governmental intervention.[57]

It has been noted that the market acted as the site of veridiction of this government rationality.[58] The market is constituted by the exchange that determines the value of things. In turn, this exchange constitutes: the truth of government.[59] At the source of any exchange springs interests. Indeed, it is my interest in your good or service which triggers my desire to exchange my good for your good or service. But interest is not only the principle of exchange, it is also the criterion of utility.[60] Thus interest finds itself at the crossroads of the principle of exchange and the principle of utility.[61] It is this which allows Foucault to argues that 'Government is only interested in interests'.[62] The concept of interest is key to the liberal rationality because it allows the combination of individual and collective interests, and thus opens up the whole field of social relations, beyond mere economic exchange. Indeed, Foucault continues:

> In the principle to which governmental reason must conform, interest is now interests, a complex interplay between individual and collective interests, between social utility and economic profit, between the equilibrium of the market and the regime of public authorities, between basic rights and the independence of the governed.[63]

Because this new governmental rationality is based on a subtle balance of interests, between competing individual and/or collective interests, or between individual interests and collective interests, security is another feature of this emerging form of liberalism, since competing interests produce fear that one's interests will be encroached upon by another person's interest.[64] There is thus an economic cost of freedom.[65] This allows Foucault to conclude his presentation of the origins of Western liberalism with the damning following comment:

> Basically, if on one side ... liberalism is an art of government that fundamentally deals with interests, it cannot do this – and this is the other side of the coin – without at the same time managing the dangers and mechanisms of security/freedom, the interplay of security/freedom which must ensure that individuals or the community have the least exposure to danger ... In short, everywhere you see this stimulation of the fear

> of danger, which is, as it were, the condition, the internal psychological and cultural correlative of liberalism. There is no liberalism without a culture of danger.[66]

Defining governmental reason as constituted by competing interests entails a culture of danger, but also, its correlative: procedures of control. Of these procedures, Bentham's Panopticon, with its mechanisms of surveillance,[67] exemplifies 'a general political formula that characterizes a type of government'.[68]

Hence Foucault's theorization of biopolitics was based on a practice of liberalism defined by utilitarian principles. Bentham's philosophy, especially with his concept of 'frugal government', his *agenda/non-agenda* divide, and the Panopticon, lies at the roots of the concept of biopolitics and shapes our understanding of the world in which we live. Foucault encapsulates this idea when he writes: 'Utilitarianism is a technology of government'.[69]

'Frugal government'[70]

Bentham's economic theories have been variously received by his successors in the discipline.[71] The purpose of this chapter is not to devote space to this controversy but rather to look at it from the vantage point of the autonomization of academic disciplines, which is of interest when considering the relationship between law and economics in Bentham. According to Schumpeter,[72] Adam Smith was the first economist, because he dealt with economics per se, and did not subordinate his discourse on economics to political or legal considerations. In the sense that Schumpeter's meaning of the term 'economist', Bentham does not qualify for the title Bentham's purpose is to subordinate economics to his general political and social aim of reforming individuals and society. Consideration of which writer should be identified as the first economist is of little interest to the present study. Adam Smith himself considered politics and ethics as well as economics.[73] Like many of his contemporaries, Bentham's economics is a political economy. I argue that Bentham's specificity is that his political economy is a branch of his indirect legislation, as his writings on interest rates, a maximum of the price of corn, taxation, inheritance law, banking monopolies, state lottery and law taxes[74] stand at the crossroads of economics and law.[75] The purpose of Bentham's proposals is to guide individual conduct to maximize individual and collective happiness. In this sense, I aim to show that Bentham's economics is biopolitical.

Foucault described Bentham's political economy as frugal.[76] The concept of frugal entails restraint not only on the part of the economic agent (consumer, investor, projector) but also on the part of the government (areas of public intervention and areas of free enterprise). However, notwithstanding Bentham's repeated use of the term, this concept is not as self-evident as it seems. In order to understand the use Bentham makes of the concept of 'frugality', which is not

necessarily the same as the one Foucault makes of it,[77] the operations of wealth-creation need to be explained.

Indeed, in accordance with the theories of physics at the time, Bentham explains the process of wealth formation in terms of *primum mobiles*. He states:

> The only sources of motion or primum mobiles as yet employed, or capable as supposed of being employ'd to advantage with reference to encrease of wealth are:
>
> 1. Masses of solid matter by their descent ...
> 2. Masses of liquid matter (water) by its descent.
> 3. Wind ...
> 4. Steam ...
> 5. Expansion of air ...
> 6. Volition: as in the case of animal motion, produced by the exercise of the will.
> 7. Motion having volition for its source or efficient cause, and the acquisition of any modification of wealth or the fruits of wealth, viz: subsistence, security or enjoyment, for its final cause, is termed labour.[78]

If these explanations may seem outdated compared to modern economics, they are important to understanding Bentham's economic system. He identifies two sources of increasing wealth: motion involving natural resources (wind, water, solid matter) and motion involving beings (beasts and humans, i.e. labour).[79] In this world view, there are two ways to increase wealth: using natural power, increasing productivity or the number of workers)[80] and saving on both.[81] Frugality is thus one of the two means of increasing wealth. If Bentham advocates frugality, first at the level of economics and then at the level of government, it is because the concept of saving derives logically from his theory of value. Foucault reads Bentham's frugality in a slightly different light. Frugality is read as a mode of government advocating lesser government action, a mode which is presented as typical of utilitarian liberalism. However, if the economic origins of the concept are highlighted, then the concept loses some of its originality and specificity.

At the time when Bentham was writing, political economy revolved around a certain number of ideas. The sovereign had the power to act upon the economy. This action promoted the following aims, either singly or commonly: the wealth of the nation, a larger population, the power of the state, extended wisdom and/or politeness.[82] The focus of government action was whether it did or should promote these aims. With Adam Smith, political economic theory took a sharp turn. It became a science, which analyses the inner structure of the functioning of the market. The focus is more on areas of non-government intervention. Bentham repeatedly claims Smith's intellectual heritage[83] and thus makes his the call for restraining government action, which he expresses in the phrase 'frugal'.

However, the focus of Bentham's and Smith's work is not the same. There is no invisible hand of the market to harmonize diverging interests in utilitarianism. Bentham's perspective is different. His starting point, as in all of the other

branches of his theory, is utility. The first aim of government is to promote individual and collective happiness. The fields of legislation, direct and indirect, and the field of economics, as opposed to ethics, for example, are the two main areas where the government is required to act. But it must act with a view to the greatest happiness. In order to map the areas of government intervention,[84] Bentham identifies four subsidiary aims of government. These aims are repeatedly mentioned in the legal[85] and economic writings alike:[86]

> In this distribution of rights and obligations, the legislator, we have already said, should have for his object the happiness of the body politic. In inquiring more particularly in what this happiness consists, we find four subordinate objects –
>
> Subsistence.
> Abundance.
> Equality.
> Security.[87]

Governments can identify in which areas they are entitled to intervene, if and only if they inquire into the effect of their acts on the four subordinate aims:

> What is incumbent on the legislator is to take care that that course of action be pursued by the whole community that is most conducive to the general end in view: that subsistence, security in all its branches, opulence and equality be attained collectively in the highest degree, and separately in the highest degrees respectively proportioned to the degree of their comparative importance.[88]

Government action is thus determined by utility alone which, in economics as in legislation, ethics and psychology, acts as a normative principle guiding action.[89] Let us look at each of these aims in turn.

What can the legislator do to increase subsistence?[90] Bentham is adamant that the paramount aim of the legislator is to promote subsistence, without which none of the other three aims are achievable, and in the absence of which the happiness of the community is nonexistent.[91] However, to say that the main aim of the legislator is subsistence need not mean that subsistence has necessarily been achieved through his agency.[92] This principle is true of subsistence as well as of any government action.[93] Legislation is an evil, albeit a necessary evil, since it produces coercion (pain) and it cannot grant rights without creating a corresponding duty (a burden) on another individual.[94] Its use should be limited to cases where no other efficient means are available. This is the case for subsistence, as the legislator cannot increase, promote or channel the means of subsistence without causing more harm than creating benefits, since the human survival instinct (which Bentham calls 'a propensity implanted in every breast')[95] ensures that each individual seeks means of subsistence to feed himself:

> What can the law do relative to subsistence? Nothing directly. All the law can do is create motives: that is to say, to establish rewards and punishments, by the influence of which, men shall be induced to furnish subsistence to themselves. But nature has created those motives, and given them sufficient energy.[96]

Bentham's reasoning is the same for abundance. He defines abundance as both an excess of wealth over and above what is needed to survive, and a great population, which he calls populousness.[97] As in the case of subsistence, he identifies a natural propensity in human beings to save and accumulate. There is thus no need to interfere to promote abundance, as there is no need to act to promote population. Bentham uses a telling example:

> Institutions on the part of government, having for their end in view the causation of encrease of population by births, may best be characterized by a parallel example – Institutions punishing men for not eating, or for eating food not sufficiently nourishing: Institutions paying all mankind for eating, with premiums for those who eat most and oftenest.[98]

Acting to promote abundance is thus not the realm of government.[99] Abundance is nonetheless essential, as it allows a surplus to act as a stock of subsistence in case of need and as a stock to be used for the internal or external defence of the realm. He explains: 'The most important use of the matter of enjoyment is its constituting a fund, convertible occasionally into means of subsistence and means of defence'.[100] And Bentham aptly concludes:

> No step ought to be taken or attempted by government in the view of causing an augmentation to take place in the national mass of wealth, with a view either to subsistence or enjoyment, without some special reason. *Be quiet* ought on these occasions to be the motto or watch word of government.[101]

The case of equality is less clear-cut, as Bentham shifted his stand on the issue as he became more radical.[102] In his earlier writings, Bentham consistently maintained that 'in regard to subsistence, opulence and equality, [the legislator's] interference is comparatively unnecessary'.[103] However, he was also aware of the relationship between equality and the other aims of government: 'But though security encreases in proportion as opulence encreases, and inequality is an inseparable accompaniment of opulence, security does not encrease in proportion as inequality encreases'.[104] In order to guarantee security,[105] which is in Bentham's eye the most important aim of government, care must be taken to ensure an acceptable level of inequality.[106] Contrary to the subsistence threshold, which is roughly the same from one individual to another and from one culture to another, when it comes to the limits of abundance, which is anything beyond subsistence, the level security needs to be constantly reassessed in respect to threats to internal or external security, to levels of subsistence and to perceptions of inequality.

The only area where the legislator can legitimately intervene is in the field of security. Bentham notes very clearly:

> In looking over the four several subordinate ends of political action, we shall [see] a great difference in respect of the demand they respectively present for the interference of the legislator. *Security* is more especially and essentially his work.[107]

This emphasis on security sounds not too remote from Foucault's stress on liberalism as promoting a culture of danger. Security is the first aim of government, because society is viewed as beset with threats to people's freedom to act and peaceful enjoyment of the fruits of their labour. However, this Foucaultian interpretation is at odds with the way Bentham viewed the primacy of security. He does not interpret his utilitarian society as promoting a culture of danger. This stress laid on security is the logical outcome of a theory based on utility. As explained in Chapter 2 and above, most government intervention can only be carried out through the direct aim of the law, in which case, by imposing sanctions, it creates pain. This pain can only be justified if it is allowed to fight an even greater pain to come. The scope of government intervention is linked to penal law. The rationale for government intervention appears in this respect only to promote security.[108] This interpretation is qualified by Bentham's use of indirect legislation, which promotes voluntary acts and thus takes the scope of government intervention out of the grip of penal sanctions, within the realm of influence on understanding (voluntary acts) and will (rewards).[109]

Government interference is thus justified in the case of security only. Nevertheless, this first statement needs to be qualified, as another distinction Bentham makes to warrant government intervention is between *agenda*, *non-agenda* and *sponte acta*. The last refers to all spontaneous actions, while the *agenda/non-agenda* divide refers to voluntary acts of government, the first of which has a positive impact on the aim sought, the second having a negative impact.[110] He explains:

> Whatever is *Sponte actum* on the part of individuals falls thereby into the class of *Non Agenda* on the part of Government. Coercion – the inseparable accompaniment, precedent, concomitant, or subsequent, of every act of government, is in itself an *evil*: to be any thing better than a *pure* evil, it requires to be followed by some more than equivalent good. Spontaneous action excludes it: action, on the part of Government, and by impulse from Government, supposes it.[111]

The means of action of government fall into three categories: punishment, rewards and influence (upon the will or upon the understanding). If the relationship between pain, coercion and punishment is self-evident, it is not so with rewards. In some cases, rewards can be beneficial. However, when it comes to financial rewards, Bentham is adamant that one cannot give to one individual or group without withdrawing from another. As money comes from taxes, that

is from compulsory deductions from other people's wealth, granting bounties, or any other form of pecuniary rewards, is taking money from one individual to give it to another.[112] The case of influence was dealt with in Chapter 4 of this volume.[113] Because government action has to guarantee an excess of pleasure over pains,[114] and because individuals are always in a better position to guarantee their interests,[115] there is comparatively little government can do in the way of *agenda*: 'In point of effect and importance, these in comparison of *Sponte Acta* and *Non Agenda*, are very inconsiderable'.[116]

Bentham aptly sums this:

> To these deficient aspects, the abilities of government are happily adapted. Inclination it could not give – it has not power to give – in the great mass of cases: not by punishments, on account of the expensiveness and, in such cases, the comparative inefficacy of such means: not by reward – for want of a sufficient stock of that scarce and valuable matter which is not to be extracted but by taxes – that is by punishments.[117]

Bentham seems to militate for very little government intervention. The scope of action of his 'frugal' government is limited. But limited to which areas? In which areas is government allowed to intervene in, without inflicting more pain in the process than the benefit it aims to create?

According to Bentham, an individual needs three factors to act: inclination, power and knowledge.[118] For the first, inclination, the state cannot do anything.[119] If the venture promises to be profitable, businessmen will turn to it naturally, if the venture is not promising, anything government can do to promote it is bound to failure, both for the individuals allured by the bounties and for the state which invested its citizens' money unwisely.[120] Second, power is an ambiguous term as it means both financial power and legal power. As public money originates from private money, through taxes, using public money to fund an individual is taking from one to give to another. Legal power is a realm where government is entitled to act, since it can create a legal framework which will allow individuals to do business unhampered.[121] Bentham identifies one main realm of action, which is marked out as the area of government intervention: knowledge.[122] Bentham states:

> The gain to be produced in this article by the interposition of government is principally on the score of knowledge. There are cases in which, for the benefit of [the] public at large, it may be in the power of government to cause this or that portion of knowledge to be produced and diffused which, without the demand for it produced by government, would either not have been produced or not have been diffused.[123]

There are different types of knowledge. The knowledge as to what business venture to start should not be the concern of government action. Areas where the

action of the state is deemed useful is when it has or is likely to have more information than any given individual:

> knowledge as to what branch of industry would be most profitable to him is what, in general, each individual is apt to be possessed of in a greater degree than government: though if government, through the industry and sagacity of any of its agents, happens in this or that particular case to have more *knowledge* about the matter than the individuals who have the choice to make, there can be no harm in the diffusion of it at the expence of government, because by even the mere advance of an impalpable portion of money well applied, an infinity of useful knowledge may be diffused.[124]

The state is not to be the sole and only provider of knowledge: knowledge can be produced or circulated from private sources. If a private individual derives pleasure in compiling statistics and publishing them at his own expense, so much the better for the state's public money.[125] For other statistical data, the state should not get involved in the collecting and publishing of any information without having first established the benefits to be derived from such information, since Bentham is keenly aware of the costs of collecting data.[126]

Bentham's emphasis on knowledge echoes Foucault's interest in power and knowledge. Bentham himself identifies knowledge as a branch of power. He writes:

> Knowledge may be considered as a branch of power. It is power so far as it depends upon the mental condition of the party whose *power* is in question. Power, in the narrower sense of the word, depends upon the state and condition of objects exterior with reference to him.[127]

Knowledge itself is not the monopoly of the state. Publicity is its duty; circulating the information it has and collecting it when the cost/benefit analysis is profitable. He explains:

> *Agendum* thereupon on the part of government – the completion of the requisite stock of *knowledge* and *power*, by furnishing the *data* to individuals; or even collecting them itself, wheresoever that operation can be performed, without preponderant vexation and expence. In every walk of life, public and private, public more especially, publicity – publicity! – is the best guardian of virtue.[128]

However, this reading of Bentham's role of government gives a distorted view of his economic thought. Indeed, economists have often opposed *Defence of Usury*[129] to *Defence of a Maximum*, where Bentham pleads for the imposition of a maximum on the price of corn. Bentham himself is aware that he might be accused of inconsistency for advocating such a measure: 'I have not, I never had nor ever shall have, any horror, sentimental or anarchical, of the hand of government'.[130] Bentham is not principled for or against government action. He derives his course of action from a cost/benefit analysis of government intervention. In

the case of legislation to impose a maximum for the price of corn, the pain of limiting the financial gain of the corn grower is outweighed by the pain of masses of indigents dying of hunger. Contrary to Smith, the market is not the truth or hallmark of government action – utility is. In this sense, Bentham is neither a liberal, nor an interventionist – he is utilitarian. The logic of utility, based on certain key principles of human motivation, which are the subjective feelings of pleasures and pains, and the fact that individuals are always best judges of their own interest, leads to limiting the action of government to collecting and diffusing data, but also to expanding it in areas relating to regulation of goods of first necessity.

Bentham's economic thought moves away from the traditional liberal/interventionist divide in order to build a consistent theory of *agenda/non-agenda* based on human motivation. His endeavour is not without flaws, however, especially in his advocacy for a public lottery. In *Defence of Lotteries*,[131] Bentham's desperate search for alternative sources of funding for the state, other than taxation which is a non-voluntary deduction of one person's wealth to give it to another, leads him to disregard psychological elements related to gambling. The labourer is said to acquire a taste for frugality by saving the sum required to pay for the annual lottery ticket.[132] However, the dangers of addiction and the pain of so many frustrated expectations are minimized by Bentham. How can Bentham establish that the pain of the tradesman who has to part with a tenth of his income in the way of taxes is higher than the pain of disappointed expectation of the labourer who spent a year saving for and dreaming about the lottery only to be one of the many unlucky ones? Either Bentham's utility calculus is incorrect or his defence of private property as the main security offered by government – along with requirement to limit unnecessary defalcations through taxes – is inconsistent with the obligation to ensure the greatest happiness of the greatest number, among which at the time there were very few property-owners and many day-labourers. Marx's well-known comment on Bentham's philosophy,[133] if narrow-minded, nonetheless pinpoints the contradictions in Bentham's thought, contradictions that appear when economics are the focus.

Biopolitical Economics

Are there biopolitical economics? What can Bentham's utilitarianism bring to the understanding of a rationale of economics grounded on biopolitics? Although Bentham's theory challenges the liberal/interventionist divide, it nevertheless reinstates another operative divide: involuntary/voluntary. In economics, as in many other areas, Bentham wishes to conduct conduct voluntarily, that is, without the intervention of criminal law. Why does Bentham favour lottery over taxation? Because one is a voluntary donation of money, the other is not. Because one is indirect legislation and the other is direct legislation.[134] Why does Bentham refuse to

intervene in the choices individuals make to invest their capital? Because individuals should be left free to decide, be their decisions wise or unwise, as long as they do not fall within the scope of criminal law. However, through collection, production and circulation of knowledge, the state's role is to help individuals make the right decisions, that is those which will be most profitable for the individual and the community. Here again, Bentham's economics is biopolitical because it is first and foremost a type of indirect legislation – that is, a conduct of conduct.

However, Bentham's biopolitical economics is not Foucault's biopolitical economics. Foucault was wrong about the market being the norm in Bentham. Foucault's intuitions about Bentham might be right but, as I and others have extensively argued, Foucault got the details wrong.[135] Foucault felt the interest of Bentham's argument about indirect legislation. However, in Foucaultian theory the conduct of conduct was clearly set apart from legal mechanisms, and put under biopolitics. Similarly in *The Birth of Biopolitics*, Foucault states that the 'site of truth':

> must be left to function with the least possible interventions precisely so that it can both formulate its truth and propose it to its governmental practice as rule and norm. This site of truth is not in the heads of economists, of course, but is the market.[136]

Throughout this chapter the gap[137] between Foucault's biopolitics and Bentham's biopolitics has been reiterated. For Foucault, the market is the norm of biopolitics. For Bentham, the norm of biopolitics is and remains in all circumstances utility. But although utility and the market use the calculus to understand and predict human individual and collective action,[138] using the same tool does not imply an identity of ideas. Utility is not the market.[139] Both follow a different rationale. If the interest of the community requires that the freedom of the market be disregarded, it will be so without any inner contradictions in the system, since utility is the rationale of government action, not the market. There is no such thing as biopolitical economics, as the term means different things in Bentham's and in Foucault's theories.

Individuals are guided, not through Smith's invisible hand of the market, but through Bentham's invisible chain of indirect legislation.[140] The principles informing the direction given by the state are shaped by a new rationality, which is utility. This means that any government decision to promote one act rather than another will be grounded on a cost/benefit analysis. When Bentham was writing, this analysis was made in terms of pleasures and pains; today it is is evaluated in financial terms. Should an 80-year-old patient be given cancer treatment on the NHS? This is not a question which is solved by reference to God or a human rights discourse; it is increasingly answered by looking at the life-expectancy of the pensioner, the quality of her/his life in late years, as well as her/his productivity as balanced by the high cost of treatment.[141]

Bentham's biopolitics is more pervasive than meets the eye. As it is first and foremost rooted in indirect legislation, which is an invisible chain, it uses all tools

at its disposal to direct individuals voluntarily in the desired direction. For this, language is one of the most powerful tools in the hands of government. Bentham is the noted philosopher of the theory of fictions, and is adamant that 'neither on that or any other occasion have I ever given, or shall I ever give, serpents for fish, sentiment or metaphor for argument'.[142] However, Bentham suggested that names of objects could be changed. Changing a name can sometimes work wonders to win a cause, where reason could not. He explains:

> Among a certain set of political philosophers, may be observed a horror of indirect taxes, a passion for direct ones: a passionate desire to be coerced and vexed. The word *indirect* seems to have been the source of illusion here, as the word *venality* when applied to judicial offices. A man who buys the office at such a price as to perform the functions of it gratis, shews that it is the function that recommends it to him, not the salary. A eulogistic or dyslogistic *appellative*, stands in place of a *reason*, and works more than a reason, upon the great body – not only of mankind, but of philosophers and politicians.[143]

What Bentham highlights is the relationship between individual beliefs and the language used to convey them.[144] As for Foucault, in *The Order of Things* he draws a parallel between language and theories of money and trade:

> for Classical thought, systems of natural history and theories of money or trade have the same conditions of possibility as language itself. This means two things: first, that order in nature and order in the domain of wealth have the same mode of being, for the Classical experience, as the order of representations as manifested by words; second, that words for a system of signs sufficiently privileged, when it is a question of revealing the order of things, for natural history – if it is well organized – and money – if it is well regulated – to function in the same way as language.[145]

The last refuge of indirect legislation and of biopolitics is language, which will be examined in the Epilogue.

Conclusion

Foucault discusses the emergence of a new government rationality emerging at the turn of the nineteenth century, of which Bentham is the most exemplary and iconoclastic representative.[146] To conclude this chapter I will endeavour to answer the question Foucault aptly raises:

> after all, what interest is there in talking about liberalism, the physiocrats, d'Argenson, Adam Smith, Bentham, and the English utilitarians, if not because the problem of liberalism arises for us in our immediate and concrete actuality?[147]

What does this government rationality, which emerged in the middle of the eighteenth century, have to do with our present political systems? Because Fou-

cault defines liberalism as an internal principle of limitation of government action, the formula of liberalism is a frugal government. As he explains:

> Let's say – and this will be why we can say that we are living in the age of frugal government – that this extensive and intensive development of a government that is nevertheless supposed to be frugal has been constantly accompanied, outside and within government, by the question of the too much and the too little.[148]

Foucault's discussion of the birth and development of liberal government manages to make sense of both the imperative of self-limitation, which is co-substantive to this mode of governance, and the consequent growth of areas of government intervention to guarantee individual and collective freedom of action and thought. However, a closer study of Bentham's thought shows that his biopolitical economics is centred on the utilitarian calculus, as opposed to Foucault's market-centred economics. In order to be recognized as such, the Bentham economic expert needs to prove that he is conversant with the utilitarian calculus, whereas the Foucault expert needs to know the workings of the market. In both cases, the expert is one who knows how economic phenomena work and who can predict future events with relative accuracy.

EPILOGUE: (DE)CONSTRUCTING BIOPOLITICS

> Words without ideas, phantoms without substance, have hitherto composed, and for a long time will continue to compose, the discourse of the bulk of arguing on politics and morals.[1]
>
> First is the wish to neutralize, and as it were polish, scientific language to the point at which, stripped of all its singularity, purified of all its accidents and alien elements ... it could become the exact reflection, the perfect double, the unmisted mirror of a non-verbal knowledge. This is the positivist dream of a language keeping strictly to the level of what is known: a table-language.[2]

From Norm to Language

Norms run through the argument of this volume. The utility principle is normative, as are Foucault's pleasures and pains, notwithstanding his refusal to norm them. What Bentham teaches us about Foucault's pleasures is that they cannot operate if they do not abide by a minimal norm, which is utilitarian in essence. Conversely, what Foucault teaches us about Bentham's pain is that utility cannot be construed as a monolithic norm. Instinct appears as the underside of motives for acts which do not comply with utility. Part I has shown how norms in Bentham and Foucault are not a scheme for assessing compliance or non-compliance to the norm; the opposition is not binary. Norms in Bentham and Foucault operate in a continuum between minimum compliance to the norm and maximum compliance. In utilitarian and biopolitical contexts, the norm is the utilitarian calculus of a cost/benefit assessment.

Part II has explored the meaning of norms in Bentham and Foucault. There are two different levels of norms: norms per se and meta-norms, the first being framed by the second. It also unearthed two types of meta-norms: the meta-norm of content and the meta-norm of form. The meta-norm of content is utility, which is assessed on a continuum of compliance as explained above. It defines the content of the normative statement. The meta-norm of form makes it possible for any normative statement to be obeyed. It ensures compliance, through the disposition to obey, which is common to Bentham and Foucault.

Legal norms, with their very intricate double meta-functioning, are not the type of normative statement Foucault privileges when he deals with biopolitics. Indeed he is adamant that the specificity of the era of biopolitics lies in the fact that mechanisms of control are not legal, but extra-legal. This leads to the study of extra-legal norms. In Foucault's works, biopolitical norms aim to lead individuals by non-legal means, be it in private or public life. In Bentham, there is a clear distinction between acts pertaining to public life and those pertaining to private life. The first is related to indirect legislation and the second to ethics. One should not be misled by conflicting terminology. What Foucault takes out of the realm of law, Bentham includes within a specific type of legal operation which he calls indirect legislation. It is certainly the case that both are performing the same analysis of the conduct of conduct, but under different names. The aim of Bentham's indirect legislation is to make individuals carry out voluntarily acts that are expected of them. He achieves this aim through the influence on understanding (voluntary acts) and will (rewards). Here Bentham's theorization of the conduct of conduct goes beyond the concept of power, which is operational in Foucault, and unites transparency and publicity, in Habermas's sense, to contribute to the formation of the general will through the reciprocal influence of the governed and the governors.

Part III has explored the concept of expertise. It focuses on individuals who have authority to impose norms on other individuals. Two figures have been studied: the moralist (Bentham's deontologist and Foucault's *parrhesisates*) and the economist. In areas of private conduct, ethics reigns freed from the chains of legislation, but not that of norms, since ethical value statements are normative. It is in this particular area that the influence of Bentham on Foucault seems to be less significant. However, it is of interest that both philosophers view themselves as self-appointed experts of ethical norms. Moreover, there is no rationale in their works to explain why certain individuals, rather than others, would be entitled to set ethical norms.

Let us now turn to the field of economics. For Bentham's economists the rationale of their action lies in a good understanding of the norms of utility, whereas for Foucault the truth of the economist's advice lies in the market. Indeed, the heritage of Bentham's thought in Foucault's work is to be seen in the well-known instance of panopticism and in *The Birth of Biopolitics*. However, I contend that if Bentham and Foucault speak of one mind when it comes to considering economic discourses, acts and previsions as another form of conduct of conduct, they differ when it comes to the content of the economic norm. In his description of utilitarian economics, Foucault situates the norm in the calculus of the market, whereas Bentham situates it in the calculus of utility. Although both *loci* function by abiding by the rules of a mathematical calculus, they differ in that the utilitarian calculus, with its specific cost/benefit analysis in terms of pleasures and pains for individuals and the community, entails that either the market might be left free to

satisfy supply and demand or that it might be curbed by the imposition of a maximum legal retail price. Both are possible, without any contradictions, on account that utility, and not the market, is the norm of the economist. Here again, the argument identifies economic norms as indirect legislation.

Legrand defines norms as rules negotiated among individuals, before being internalized and re-coded by them.[3] This negotiation and re-coding is mediated by language. Are words a neutral chain of communication between norms, or do they carry in the folds of their layered meanings normative value judgements? Bentham opens *A Table of the Springs of Action* with the distinction between real and fictitious entities, thereby suggesting that language lies at the source of action.[4] Eulogistic or dyslogistic opinions about acts expressed in words are conveyed through language by public opinion. This public opinion thus sets norms of acceptable or unacceptable behaviour. Bentham explains:

> Of the declared opinions, of such of the several members of the community, by whom respectively in relation to the subject in question, an opinion or judgement of *approbation* or *disapprobation* is expressed, is that quantity of the force of public opinion, otherwise termed 'the force of the popular and moral sanction', which is thus brought to bear upon that subject, composed and constituted.[5]

Foucault also studies the lines of power-relations crisscrossing through discourses.[6] Foucault and Bentham are aware that such discursive strategies are used by those who hold political, religious and professional power to marginalize certain categories of individuals who do not comply with the norm, by describing their difference as 'deviant'. These discursive strategies are part of a wider scheme for governors to control the governed. Resistance, which includes a stand towards norms, and language, which embeds them, is Foucault's answer to power-in-language. As for Bentham, he de-constructs the operations of power in language down to the minute workings of a grammatical sentence, in order to re-construct a new language of utility. This new utilitarian language would need to be written using words devoid of any positive or negative connotations.

Normative Language[7] in Bentham

How does language become normative? Whereas Foucault explores the impact of (normative) discourse from the Enlightenment to today, Bentham had a twofold aim. Firstly, he wished to make visible the sinister interest at work in language and secondly, he wished to establish the reign of utility. In order for individuals and institutions to be persuaded by the need to create a utility-driven society, the first thing is for fictions to be removed from language.[8] Bentham's double endeavour takes us from normative sinister discourse to normative utilitarian discourse. In this, as in many other areas, the venture belongs to the field of biopolitics, since Bentham examines the ways in which words can be used

as a strategy, not to describe facts, but to make individuals behave as they are expected to behave.

Bentham's theory of language, called the theory of fictions, rests on entities, which he defines as:

> a denomination in the import of which every subject matter of discourse, for the designation of which the grammatical part of speech called noun-substantive is employed may be comprised.[9]

These entities are divided into real and fictitious. Real entities designate objects, which are real, which means objects one speaker can point at in the presence of another. The word 'apple' is a real entity, for example. Fictitious entities do not refer to any object existing in real life. The word obligation is a good example of a fictitious entity.[10] Fictitious entities can be granted reality for the purpose of discourse. Fictitious entities are most dangerous when speakers lend them a reality they do not have for the purpose of promoting the interests of a class:

> It has been among the devices of lawyers to connect everything that is justly dear to the heart, the absurdities and the vices in and by which they reap their profit. Fiction – the vice which they are not ashamed to avow and to magnify under that name – fiction has never been either more or less than lying, for the purposes of extortion and usurpation: – yet men who ought to have known better, have not been ashamed to stand up and speak of fiction as the foundation and efficient cause, *causa sine quâ non* of everything that is most valuable in the fabric of the constitution, and the texture of the common law.[11]

If fictitious entities can give rise to ambiguity in discourse, they are nonetheless essential for people to communicate.[12] The need to use both fictitious and real entities rests on the psychological springs of the relationship between language and ideas.[13] In order to avoid ambiguity, Bentham suggest that fictitious entities be defined by means of a paraphrase referring it to a real entity,[14] since 'every fictitious entity bears some relation to some real entity, and can not otherwise be understood than in so far as that relation is perceived – a conception of that relation is obtained'.[15]

Fictitious entities, especially those which carry normative functions, are of interest here. 'Rights' and 'obligations' are concepts used to create rules, be they laws or norms. In *Principles of a Civil Code*, Bentham defines rights and obligations as an advantage for the person who profits from them and a burden for the person who bears them.[16] In *Theory of Fictions*[17] Bentham states that obligations create pain and rights create pleasures.[18] This definition is obtained thanks to Bentham's theory of fictions, which allows him to use a fictitious entity without leaving the term indeterminate, which would serve as a wedge for the sinister interest of religious, political, economic and social *elites*. In order to rid fictitious

entities of ambiguities, they are defined using the only possible real entity: sensations of pleasure and pain. Bentham explains:

> The fictitious entities which compose this group have all of them, for their real *source*, one and the same sort of real entity, viz. *sensation*; the word being taken in that sense in which it is significative not merely of perception but of perception considered as productive of pain alone, or pleasure alone, or of both. Pain (it is here to be observed) may have for its equivalent, loss of pleasure; pleasure, again, may have for its equivalent, exemption from pain.[19]

Bentham's method helps him to define an obligation:

> An obligation (viz. the obligation of conducting himself in a certain manner) is incumbent on a man (*i.e.* is spoken of as incumbent on a man) in so far as, in the event of his failing to conduct himself in that manner, pain, or loss of pleasure, is considered as about to be experienced by him.[20]

The term to be defined is positioned first in the sentence. As it is a fictitious entity, it cannot be defined *per genus et differentiam*, as in the Aristotelian method used for real entities. Bentham's paraphrasis is used as follows: a proposition explaining the fictitious entity with a predicate ('is incumbent upon a man') and a copulate ('is'). If the fictitious entity is not built in a proposition which links its real use (obligations cannot exist without human beings to bear them), the fictitious entity is likely to remain a disincarnate concept, whose use is open to any manipulative abuse. The paraphrasis above links the fictitious entity with feelings of pain and pleasure,[21] as is consistent with Bentham's utilitarianism as described in *An Introduction to the Principles of Morals and Legislation*.[22]

In defining 'obligation' as he did, Bentham prevented vested interests from using it to promote their own interests. In *Nonesense Upon Stilts*, which is a criticism of the French Declaration of Human Rights (1793), Bentham stressed the dangers of leaving blurry a legal concept which is fraught with heavy moral and political undertones. The legal fictitious entity 'right', for example, has been used wrongly over the centuries, not to describe what ought to be (human beings should be granted such or such a right), but what speakers (as the framers of the French Declaration) present as what is (human beings have a right to property). In so doing, the framers did not describe facts but tried to present their desires for facts.[23] Because, in his legal theory, rights and obligations are linked,[24] Bentham cannot consider granting rights without imposing the corresponding obligation. One cannot speak of obligations without saying it is a burden on a man ('is incumbent on a man'), as one cannot speak of rights without assigning an individual who benefits from them ('a man is said to have it, to hold it, to possess it, to acquire it, to lose it').[25] However, in practice and in both cases, these rights and obligations are granted or imposed by a government.[26] Rights can

only be political rights and not natural rights.[27] Despite what successive French Declarations state, Bentham cannot recognize the existence of innate rights.[28] Bentham is able to challenge the existence of natural rights thanks to his method of defining terms. This shows how powerful his method is and how efficient it is for theoretical purposes. It gives the world a definition of 'rights' based on sensations of pleasures and pain, therefore offering a clear route to constructing a new language on the foundations of the norm of utility.

The dichotomy Bentham introduces in language between real and fictitious entities raises the issue of the relationship between words and things. In Bentham's expository and de-constructive phase, fictitious entities do not express the truth of the significant, but rather the state of mind of the person speaking. Thanks to the method of paraphrasis explained above, a censorial and reconstructing phase steers fictitious entities back towards expressing a certain likeness to 'truth', as Bentham understands it. This truth is expressed in terms of pleasures and pains. The truth of language rests in sensations, that is, ultimately in utility.[29]

Unlike fictitious entities, real entities have a natural affinity with truth. He writes:

> If they can shew me a fictitious entity existing without a real one I will believe them. It is from Real entities only that we get any Idea at all of fictitious ones. They exist only in real ones. If a proposition be not true of them as they exist in real entities it is not true at all. Let them show me heat, weight, motion, time, figure &c independent of matter. Not only they cannot show me any figure existing without being of a certain size occupying a certain space being of a certain quantity, but no one can conceive such a figure to exist, he can have no such image in his mind.[30]

Truth is linked to a tangible reality which can only be expressed in real entities, that is, physical entities, which are made up of substances and sensations.[31] It is thus through sensations that the truth of a statement can be checked. This sensory experience brings statements back to reality. Reality would seem to be binary: that which is felt (that is, which exists) and that which is not.

However, absolute conviction about the existence of an object cannot come from the senses alone.[32] Sensory perceptions are not acute enough to feel minute details.[33] The senses can also be mistaken, which means there is a conflict between truth and utility. In this case, the bond between reality and truth is broken, even in the censorial and reconstructing phase of Bentham's linguistic endeavour.

The dichotomy between apparent and real punishment drives a wedge between truth and utility. If apparent punishment could have the same effect as real punishment, then the benefits in terms of pain infliction would be major. However, Bentham soon drops the idea, which appears briefly in *An Introduction to the Principles of Morals and Legislation*,[34] because if, in theory, it would

spell the end of punishment and pain in a utilitarian society, in practice, it is unworkable. However, this example is interesting as it highlights that, for Bentham it is not the relation between language and reality which is paramount, but the relationship between language and utility. In a utilitarian use of language, what is important is the ability of language to increase one's pleasure and diminish one's pain: to make accurate predictions relative to the existence of an object or one of its properties, in order to get one's utilitarian calculus right.

In Bentham's language of utility, truth hovers between a close connection to empirical sensations, which links language and reality, and fluctuating predictions on the nature of an event.[35]

One way of making sense of the relationship between utility and truth is through the example of mathematics. Bentham's study of mathematics leads him to conclude that although mathematical propositions partially refer to physical objects, this approximation is unavoidable and mathematics nonetheless remain useful.[36] The same stands for utility, especially on account of the normative continuum of compliance with the utilitarian norm. Utility is approximate truth, and vice versa.

Towards Biopolitical Language

Foucault's description of the shift from the paradigm of the order, in the Classical period, to that of history,[37] in the Romanticist period,[38] as regards the relationship between language and things shares common features with some aspects of Bentham's theory of fictions. Indeed Foucault dealt with archives on general grammar, natural history and political economics (the analysis of wealth), written at the time of Bentham's literary career. Foucault does not mention Bentham either in *The Order of Things* or in any subsequent writing in relation to language and methodology[39] and it is unlikely that Foucault had read Bentham as early as the 1960s (when he wrote his book). Nevertheless, there is some interesting analysis of the role of language which helps to locate Bentham's theory of fictions in the field of biopolitics (even if the use of the concept is anachronistic when analysing *The Order of Things*).

How is Foucault's analysis of language structures relevant to understanding Bentham's theory of fictions? Three points are of note. First, Bentham's descriptive statements consider language as made up of sequences. These sequences rely on the proposition as their unit.[40] When describing principles of general grammar in the eighteenth century, to which Bentham subscribes, Foucault identifies the subject, the predicate and the link between them.[41] The predicate attributes existence to objects,[42] nouns are the basis for generalities,[43] and adjectives designate 'everything in representation which cannot subsist by itself'.[44] In Bentham's theory, as adjectives ascribe quality to things, they are the reserved precinct of

fictitious entities. When it comes to nouns, predicates and adjectives, Bentham is very close to the theories of his time, as explained by Foucault.

Second, Bentham's descriptive statements aim to highlight areas in discourse where language is used as a tool for domination. This concern is common with Foucault's statements on power. Language is not simply a tool in the hands of individuals to express their thoughts, but a means to ensure the furtherance of their own interests (against those of others, if need be). This element of power in the use of language is described by Bentham as a 'sinister interest'.[45] Foucault is very much aware of the power–knowledge relationship, which is present even in his more literary commentaries. Foucault writes:

> New questions will be heard:
> 'What are the modes of existence of this discourse?'
> 'Where does it come from; how is it circulated; who controls it?'
> 'What placements are determined for possible subjects?'
> 'Who can fulfil these diverse functions of the subject?'[46]

In this sense, language brings us back to concerns common with power networks in law, ethics and economics, as they are dealt with in the previous chapters.

What is new and needs to be explored here is the implications of the fictitious quality of language. This is the third aspect of the descriptive statements on language. Foucault explains: 'Writing, in Western culture, automatically dictates that we place ourselves in the virtual space of self-representation and reduplication'.[47] Foucault, like Bentham, extends the use of fictions to a series of mechanisms outside language. Foucault writes about economics: 'To say that money is a pledge is to say that it is no more than a token accepted by common consent – hence a pure fiction'.[48] What is a fiction? A fiction originates from a conception of language as a mode of representation.[49] Construing language as a system of representation (as opposed to considering signs as part of the things themselves) opens up a space between things and the words that describe them. This space involves a distance from the world, which enables the world to be rearranged around new relationships between the eye and discourse.

Foucault identifies tables and catalogues as exemplifying this new relationship, which arranges the linearity of the written word into the two-dimensional space of diagrams and lists. This echoes Bentham's obsession with tables and nomography, i.e. the rules to write laws. On Linnaeus, whose methodology was openly adopted by Bentham, Foucault writes: 'His wish was that the order of the description, its division into paragraphs, and even its typographical modules, should reproduce the form of the plant itself'.[50] Structure is paramount and acts as a grid through which the passage from representation to language is modelled.[51]

This use of language is consistent with the era in which Bentham lived, a period of eighty-four years covering the second half of the eighteenth century and

the first third of the nineteenth century. His early education and pursuits were influenced by writers of his time, including Linnaeus. His use of language prefigures Foucault's shift from order to history. Fictions, on account of the gap they underline between words and things, between signified and significant, between the level of reality and that of the symbolic,[52] are the seat of subjectivity. The gap between language and reality is reflected in the operation of the senses. The utilitarian calculus is based on pleasures and pains, be they immediate or represented. Representations of pleasures and pains allow the calculus to work mainly at the level of mental representations, and of the language used to express them.[53] Bentham's fictions and utility, and the reflection on reality and subjectivity they encapsulate, are of interest to psychologists, including Jacques Lacan.[54] Bentham opened up the 'transcendental field of subjectivity'[55] by separating language into two categories of real/fictitious which create an 'obscure verticality'.[56] The fictitious entity carries the creative potential of language beyond the senses. It goes deep into the psyche of a community (through the standard phrases, similes and association of ideas) and into the psyche of an individual (in his relationship to others, to himself, to rules of language). Bentham's fictions thus open up the field of psychoanalysis. Foucault describes psychoanalysis thus:

> psychoanalysis advances and leaps over representation, overflows it on the side of finitude, and thus reveals, where one had expected functions bearing their norms, the simple fact that it is possible for there to be system (therefore signification), rule (therefore conflict), norm (therefore function).[57]

Bentham's theory of fictions spins the tale of the relationship of individuals with their environments, the symbolic psychological mechanisms by which they express it, and their competing relations with others.

Foucault ends his argument in *The Order of Things* with a question, the answer to which could open up the way to future thought.[58] His statement originates in the break the concept of representation, and its dissolution in the late nineteenth and twentieth centuries, created in language. Foucault's argument relates to the figure of Man. Even if the theory of Man is not relevant to the present argument, we still need to assess the effect of the symbolic chasm in the field representation on the way language is used. To end this section, I suggest a definition of 'biopolitical language', that is a language which has gone through the division of representation in the eighteenth century followed by the blurring of boundaries in the nineteenth and twentieth centuries.

I contend that language, as an archive[59] in Foucault's sense, carries the depth of its successive use, as various strata of meaning are piled one on top of the other. Language became an archive the day it became an object.[60] Biopolitical language reflects in its operation the tension between the need to represent and the failure to do so. It is enmeshed in power-relations, in that every state-

ment is the expression of an interest, which competes with other interests. It is unconsciously normative, because it relies on the networks of collective and individual symbolic meanings, and consciously so when it prescribes behaviour, through public opinion, for example. It stands as an item of exchange: one word for another, one statement for another. As in the case of economics, its value is assessed as regards its utility: '[t]he value of things is thus founded on their utility'.[61] And as words are exchanged for other words, their values increase in the process, as 'the exchange achieved upon the basis of these primary utilities is not their simple reduction to a common denominator. It is itself creator of utility.'[62]

Utility of language is one of the features biopolitical language retains from its eighteenth-century ancestors. This utility is assessed in two ways: in its aptitude to describe reality, through sensory experience, and in its ability to predict future events. However, it merges with the nineteenth-century dissolution of language, caused by its symbolic breach, and considers its Death, Desire and Law. Psychoanalysis shows how inadequate language is to speak about the unconscious. Its method to analyse madness is unsatisfactory, since madness uses a language which frees itself from certain normative rules.[63] Biopolitical language stands at the crossroads of adequacy and inadequacy. Language is as much about power as any other human activity, and as such it abides by the Foucaultian theorem of repression and production:

> What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no; it also traverses and produces things, it induces pleasure, forms knowledge, produces discourse.[64]

Human language is poised between its apparent adequacy and its covert inadequacy. This fundamental imbalance at the core of language can either cause repression, in the hands of sinister interests, or create productive networks, as when Foucault credited Californian homosexual subculture with redefining the rules of human relationships.

On the issue of language, norms, influence, conduct and interest, the attempt to define Foucault's biopolitics in the light of Bentham's utilitarianism offers a double reading – one that is based on Bentham's work in the light of Foucault's interpretation of it in his last writings, and another that examines Foucault's work through the prism of utility. The concepts suggested throughout (biopolitical pleasure, biopolitical pain, biopolitical norm, biopolitcal ethics, biopolitical economics and biopolitical language) are witness to the fecundity of such a comparison.

NOTES

The following abbreviations have been used throughout the notes:

UC MS	Bentham papers held at the Library of University College London.
MS Dumont	Dumont papers held at the Bibliothèque de Genève, Switzerland.

General Introduction

1. N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), available online on the Questia database, at http://www.questia.com/PM.qst?a=o&d=105423409 [accessed 3 October 2011].
2. M. Foucault, 'Le panoptisme', in M. Foucault, *Surveiller et punir: Naissance de la prison* (1975; Paris: Gallimard, 2000), pp. 228–64, translated as M. Foucault, 'Panopticism', in M. Foucault, *Discipline and Punish*, trans. A. Sheridan (1977; London: Penguin Books, 1991), pp. 195–228.
3. See J.-A. Miller, 'Le despotisme de l'Utile: la machine panoptique de Jeremy Bentham', *Ornicar? Bulletin périodique du Champ freudien*, 3 (1975), pp. 3–36 and M. Perrot, 'L'inspecteur Bentham', in J. Bentham, *Le Panoptique* (Paris: Belfond, 1977). There are other academic studies on Bentham, which were roughly contemporary to *Discipline and Punish*, and which share the same strand of interpretation on Bentham, as a control freak, human rights violator and despot, but which do not derive their inspiration from Foucault's *Discipline and Punish*: G. Himmelfarb, *The Idea of Poverty: England in the Early Industrial Age* (London: Faber, 1985); G. Himmelfarb, 'The Haunted House of Jeremy Bentham', in G. Himmelfarb, *Victorian Minds* (New York: Knopf, 1968); C. Bahmueller, *The National Charity Company: Jeremy Bentham's Silent Revolution* (Berekley, CA: University of California Press, 1981).
4. The interest in Bentham's works can be measured by the number of translations (into French) of his works. There are no registered French translations between 1880 and 1990, except Foucault's presentation of the Panopticon in *Le Panoptique. Précédé de L'Œil du pouvoir, entretien avec Michel Foucault [et Jean-Pierre Baroul], postface de Michelle Perrot* (Paris: Belfond, 1977). See M. Bozzo-Rey, A. Brunon-Ernst and E. de Champs, 'La traduction de *l'Introduction to the Principles of Morals and Legislation* par le Centre Bentham', *Revue d'études benthamiennes* [e-journal], 1 (2006), available online at <http://etudes-benthamiennes.revues.org/169> [accessed 17 August 2011].
5. E. Halévy, *La formation du radicalisme philosophique*, ed. M. Canto-Sperber, 3 vols (Paris: PUF, 1995).

6. See P. Schofield, 'Panopticon', in P. Schofield, *Bentham. A Guide for the Perplexed* (Bodmin: Continuum, 2009), pp. 70–93, on p. 70; J. Semple, 'Bentham's Haunted House', *Bentham Newsletter*, 11 (1987), pp. 35–44, on p. 35. See also the comment made by J. R. Dinwiddy: 'the most indignant modern attacks on Bentham as a thinker have come from writers who have focused on [the panopticon projects] areas of his work', in J. R. Dinwiddy, *Bentham* (Oxford: Oxford University Press, 1989), p. 94.
7. J. Bentham, *Fragment sur le gouvernement suivi du Manuel de sophismes politiques*, trans. and with a preface by J.-P. Cléro (Paris: Librairie Générale de Droit et de Jurisprudence, 1996); J. Bentham, *De l'ontologie*, ed. P. Schofield, trans. J.-P. Cléro and C. Laval (Paris: Points Seuil, 1997); C. Audard (ed.), 'Jeremy Bentham: extraits de l'Ontologie, Table des sources de l'action, Introduction aux principes de morale et de législation, Fragment sur le gouvernement, Contre le soi-disant amour de la justice et de la liberté, Principes directeurs d'un Code Constitutionnel, Code Constitutionnel, Le Panoptique, Défense de l'usure', in *Anthologie historique et critique de l'utilitarisme*, trans. J.-P. Cléro, 3 vols (Paris: Presses Universitaires de France, 1999), vol. 1.
8. J. Bentham, *Garanties contre l'abus de pouvoir et autres écrits sur la liberté politique*, trans. M.-L. Leroy (Paris: Editions rue d'Ulm, 2001); J. Bentham, *Le Panoptique*, ed. C. Laval, trans. E. Dumont (Paris: Mille et Une Nuits, 2002); J. Bentham, *Essai sur la pédérastie*, trans. J.-C. Bouyard in 'Questions de genre', *GKC*, 55 (2002); J. Bentham, *Le premier ministre. Code Constitutionnel, chapitre VIII* [1830], trans. G. Tusseau, in *Revue française d'histoire des idées politiques*, 19 (2004); J. Bentham, *Défense de la liberté sexuelle. Ecrits sur l'homosexualité*, ed. C. Laval, trans. E. Meziani (Paris: Mille et Une Nuits, 2004); J. Bentham, *Chrestomathia*, trans. J.-P. Cléro (Paris: Cahiers de l'Unebévue, 2004); J. Bentham, 'Les sophismes anarchiques', trans. J.-P. Cléro, in B. Binoche (ed.) *Contre les droits de l'homme* (Paris: Presses Universitaires de France, 2005); J. Bentham, *La table des ressorts de l'action*, trans. J.-P. Cléro (Paris: Cahiers de l'Unebévue, 2008); J. Bentham, *Introduction aux Principes de la Morale et de la Législation*, trans. M. Bozzo-Rey, A. Brunon-Ernst, J. P. Cléro, E. de Champs, C. Laval, M. L. Leroy and G. Tusseau (Paris: VRIN, 2011).
9. See for example: M. Bozzo-Rey and E. Dardenne (eds), *Deux siècles d'utilitarisme* (Rennes: PUR, 2012); M. Bozzo-Rey and G. Tusseau, *Bentham, juriste* (Paris: Economica, 2010); J. Bentham, *Traites de législation civile et pénale*, ed. M. Bozzo-Rey, A. Brunon-Ernst and E. de Champs (Paris: Dalloz, 2010); A. Brunon-Ernst, *Le Panoptique des pauvres* (Paris: Presses de la Sorbonne Nouvelle, 2007); A. Brunon-Ernst (ed.), *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Aldershot: Ashgate, 2012); C. Chauvet, *Jeremy Bentham: vie, oeuvres, concepts* (Paris: Ellipses, 2010); J.-P. Cléro, 'Le sens moral chez Hume, Smith et Bentham', in C. Lazzeri (ed.) *Le sens moral, une histoire de la philosophie morale de Locke à Kant* (Paris: Presses Universitaires de France, 2000), pp. 81–112; J.-P. Cléro, 'L'autorité en perspective. La nomographie comme science de l'autorité', *Cités*, 6 (2001), pp. 13–23; J.-P. Cléro, 'Le traitement des sophismes politiques, de Jeremy Bentham à John Stuart Mill', *Cercles*, 4 (2002), pp. 89–120, available online at <www.cercles.com>; J.-P. Cléro (ed.), *Cités*, 'L'utilitarisme aujourd'hui. Le bonheur sous contrôle?' special issue (2002); J.-P. Cléro, *Bentham philosophe de l'utilité* (Paris: Ellipses, 2006); J.-P. Cléro, and C. Laval, *Le vocabulaire de Bentham* (Paris: Ellipses, 2002); E. de Champs, 'Le mécanicien du bonheur', *Notre Histoire* (February 2000), pp. 58–63; E. de Champs, 'La postérité des idées de Jeremy Bentham: la notion d'influence à l'épreuve', *Cromohs*, Cyber review of modern historiography, 11 (2006), pp. 1–17; E. de Champs, *'La déontologie politique' ou, La pensée constitutionnelle de J. Bentham* (Geneva: Droz, 2008); E. de Champs and J.-P. Cléro (eds), *Bentham et la France. Fortune et infortunes de l'utilitarisme*

(Oxford: SVEC 2009); C. Laval, *Bentham et le pouvoir des fictions* (Paris: Presses Universitaires de France, 1994); C. Laval, *Jeremy Bentham, les artifices du capitalisme* (Paris: Presses Universitaires de France, 2003); M.-L. Leroy, 'Le panoptique inversé: Théorie du contrôle dans la pensée de Jeremy Bentham', in C. Lazzeri, *La production des institutions* (Clermont-Ferrand: Presses Universitaires Franc-Comtoises, 2002), pp. 155–77; M.-L. Leroy, 'L'altruisme intéressé de Jeremy Bentham', *Le Mag Philo*, CNDP, November 2004; M.-L. Leroy, 'Guerre et intérêt national: le pacifisme calculateur de Jeremy Bentham', *Le Mag philo*, CNDP, May 2005; G. Tusseau, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarisme juridique* (Paris: L'Harmattan, 2001); G. Tusseau, 'Jeremy Bentham et les droits de l'Homme: un réexamen', *Revue trimestrielle des droits de l'Homme*, 50 (2002), pp. 407–31; G. Tusseau, 'Sur le panoptisme de Jeremy Bentham', *Revue française d'histoire des idées politiques*, 19 (2004), pp. 3–38; C. Wrobel, 'Gothique et Panoptique: lecture croisée des oeuvres d'Ann Radcliffe (1764–1823) et de Jeremy Bentham (1748–1832)' (PhD dissertation, Paris Ouest-Nanterre-La Défense University, 2009).

10. First international symposium on 'Bentham and France', organized by the Centre Bentham, at Paris Ouest-Naterre-La Défense University, Paris, 2–4 November 2006.
11. Brunon-Ernst (ed.), *Beyond Foucault*.
12. A. Brunon-Ernst (ed.), *Revue d'études benthamiennes* [e-journal], 8, Foucault et l'utilitarisme (2011), available online at <http://etudes-benthamiennes.revues.org/240> [accessed 17 August 2011].
13. J. Ferrand, 'La généalogie de l'utilitarisme européen', *Revue d'études benthamiennes* [e-journal], 8, Foucault et l'utilitarisme (2011), available online at <http://etudes-benthamiennes.revues.org/292> [accessed 13 January 2012].
14. C. Laval, 'Ce que Foucault a appris de Bentham', *Revue d'études benthamiennes* [e-journal], 8, Foucault et l'utilitarisme (2011), available online at <http://etudes-benthamiennes.revues.org/259> [accessed 13 January 2012].
15. A. Brunon-Ernst, 'Introduction : Foucault est-il utilitariste?', *Revue d'études benthamiennes* [e-journal], 8, Foucault et l'utilitarisme (2011), available online at http://etudes-benthamiennes.revues.org/335 [accessed 13 January 2012].
16. Semple, 'Bentham's Haunted House', p. 35.
17. On the notion of biopower and biopolitics, see M. Donnelly, 'Des divers usages de la notion de biopouvoir', in *Michel Foucault philosophe. Rencontre internationale Paris 9, 10, 11 janvier 1988* (Paris: Seuil, 1989), pp. 230–5; R. Nigro, 'De la guerre à l'art de gouverner: un tournant théorique dans l'œuvre de Foucault ?', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1030.html> [accessed 25 January 2010]; D. Sardinha, 'La découverte de la liberté', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/1037> [accessed 25 January 2010]; D. Cohen, 'La population contre le peuple', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1035.html> [accessed 25 January 2010]; C. Ruelle, 'Population, milieu et normes', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1031.html> [accessed 25 January 2010]; E. Taïeb, 'Individuation et pouvoir politique', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1032.html> [accessed 25 January 2010]; L. Loiseau, 'Un art libéral de punir', *La biopolitique (d')après Michel Foucault*, *Labyrinthe*, 22:3 (2005), [e-journal], available online at <http://labyrinthe.revues.org/1036> [accessed

25 January 2010]; D. Moreau, 'Dispositifs de sécurité et épidémie du SIDA', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/1038> [accessed 25 January 2010]; A. Skornicki, 'Le 'Biopouvoir': détournement des puissances vitales ou invention de la vie ?', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1034.html> [accessed 25 January 2010]; L. Dubreuil, 'De la vie dans la vie: sur une étrange opposition entre *zôê* et *bios*', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/index1033.html> [accessed 25 January 2010]; E. Mollet, 'Le projet de constitution européenne à la lumière de Foucault', *Labyrinthe*, 22:3, La biopolitique (d')après Michel Foucault (2005), [e-journal], available online at <http://labyrinthe.revues.org/1039> [accessed 25 January 2010]; M. Ojakangas, 'Impossible Dialogue on Bio-power: Agamben and Foucault', *Foucault Studies*, 2 (2005), pp. 5–28.

18. S. Legrand, 'Foucault et l'économie du pouvoir', talk at the 'Is Foucault Utilitarian ?' workshop, organized by the Centre Bentham at the Panthéon-Assas University, on 21 January 2011.
19. Rose, *Powers of Freedom*, p. 1.
20. Ibid., p. 277.
21. Ibid., p. 279–80.
22. Ibid., p. 4.
23. M. Foucault, 'Governmentality' (1978), ed. J. D. Faubion, trans. R. Hurley, *Power: Essential Works of Foucault*, 3 vols (London: Penguin, 2002), vol. 3, pp. 219–20.
24. A. Brunon-Ernst, 'Le vocabulaire benthamien dans le lexique français et anglais: couple langue-culture fusionnel ?', R. Greenstein (ed.), *Langue et culture, un mariage de raison?* (Paris: Presses de la Sorbonne, 2009), pp. 95–118.
25. M. Foucault, *The Archeology of Knowledge* (1969; London: Routledge, 2007), pp. 142–8. The concept of archaeology was criticized for offering a methodology which was neither that of history nor sociology (Rose, *Powers of Freedom*, pp. 279–80).
26. Foucault, *The Archeology of Knowledge*, pp. 23–4.

Part I: Biopolitics of Interests

Introduction: From Interest to Norms

1. M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, ed. M. Senellart, trans. G. Burchell (London: Palgrave Macmillan, 2008), p. 51.
2. C. Phillipson, *Three Criminal Law Reformers. Beccaria, Bentham, Romilly* (London: J. M. Dent & Sons, 1923), p. 180. For a condensed but efficient presentation of the principle of utility, see M. H. James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), pp. 9–38.
3. Dinwiddy, *Bentham*, pp. 25–6.
4. F. Rosen, *Jeremy Bentham and Representative Democracy. A Study of the Constitutional Code* (Oxford: Clarendon Press, 1983), p. 201, quotes manuscript source UC MS, box 112, f. 154, dated 3 June 1828.
5. Ibid., p. 202.
6. James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), pp. 9–38.

7. J. Bonner, *Economic Efficiency and Social Justice. The Development of Utilitarian Ideas in Economics from Bentham to Edgeworth* (Aldershot: Edward Elgar, 1995), p. 6. See also Dinwiddy, *Bentham*, pp. 20–1 who states that Bentham's philosophy is based on both a factual and a normative statement. See also P. J. Kelly, *Utilitarianism and Distributive Justice* (Oxford: Clarendon Press, 1990), p. 48 and R. Harrison, *Bentham* (London: Routledge & Kegan Paul, 1983), p. 142.
8. Bentham was adamant that his principle could not be proved. See Kelly, *Utilitarianism and Distributive Justice*, p. 49.
9. J. Steintrager, *Bentham* (London: George Allen & Unwin, 1977), p. 37.
10. Bonner, *Economic Efficiency and Social Justice*, p. 6. See also P. Schofield, 'Jeremy Bentham: Legal Philosopher and Political Reformer', in C. Fuller (ed.), *The Old Radical: Representations of Jeremy Bentham* (Bentham Project, London: UCL, 1998), p. 2 (Schofield reads the principle of utility as both a theory of motivation and a theory of ethics).
11. Harrison, *Bentham*, p. 136. Harrison states that the stress on calculus comes from Dumont in the *Traités de législation civile et pénale*, not Bentham.
12. Ibid., p. 149.
13. E. Griffin-Collart, *Egalité et justice dans l'utilitarisme. Bentham, J.S. Mill, H. Sidgwick* (Brussels: Bruylant, 1974), vol. 2, p. 31.
14. Harrison, *Bentham*, p. 158.
15. Ibid., pp. 162–3.
16. Bahmueller, *The National Charity Company*, p. 4.
17. Harrison, *Bentham*, p. 150.
18. A. Dube, *The Theme of Acquisitiveness in Bentham's Political Thought* (New York and London: Garland Publishing, 1991), p. 99.
19. Ibid.
20. Dinwiddy, *Bentham*, pp. 20–1.
21. See Harrison, *Bentham*, p. 106; Dinwiddy, *Bentham*, p. 20; Schofield, 'Jeremy Bentham: Legal Philosopher and Political Reformer', p. 2 (Schofield reads the principle of utility as both a theory of motivation and a theory of ethics); Dube, *The Theme of Acquisitiveness*, p. 87; Rosen, *Jeremy Bentham and Representative Democracy*, p. 29; Kelly, *Utilitarianism and Distributive Justice* p. 48.
22. Dinwiddy, *Bentham*, p. 20.

1 Biopolitical Pleasure

1. J. Bentham, 'Sex' (1814–16), in UC MS, box 74, ff. 40ff. These manuscripts are now published in J. Bentham, *Selected Writings*, ed. S. G. Engelmann (New Haven, CT: Yale University Press, 2011).
2. In Foucault's works, the term *dispositif* means the institutional mechanisms and knowledge networks which secure the exercise of power in society.
3. When using the phrase 'pleasures' or 'biopolitical pleasures', this chapter refers to strategies of resistance in a biopolitical era. See G. Horoviwitz, 'The Foucaultian Impasse: No Sex, No Self, No Revolution', *Political Theory*, 15:1 (1987), pp. 61–80. Foucault's chronological divisions are called eras.
4. M. Foucault, *The History of Sexuality: The Will to Knowledge*, trans. R. Hurley, 3 vols (London: Penguin Books, 1998), vol. 1, p. 157.
5. M. Foucault, 'Friendship as a Way of Life' (1981), in *Ethics: Subjectivity and Truth*, ed. P. Rabinow, trans. R. Hurley et al., 3 vols (London: Penguin Books, 2000), vol. 1, p. 139.

6. N. Fraser, 'Foucault's Body Language: A Post-Humanist Political Rhetoric', *Salamagundi*, 61 (1983), pp. 55–70, reprinted in B. Smart (ed.), *Michel Foucault: Critical Assessments*, 7 vols (London: Routledge, 1994), vol. 3.
7. L. Crompton, *Journal of Homosexuality*, 3:4 (1978), pp. 389–405; continued in 4:1 (1978), accessed in *Stonewall and Beyond: Lesbian and Gay Culture* (the online edition of a Columbia University Libraries exhibition held from 25 May to 17 September 1994 in conjunction with the international celebration of the twenty-fifth anniversary of the Stonewall Riots), available online at <http://www.columbia.edu> [accessed 24 November 2009]; and Bentham, *Défense de la liberté sexuelle*. The quote is taken from Bentham, 'Offences Against Oneself', p. 14.
8. Evidence of Foucault's knowledge of Bentham's writings on the Panopticon is to be found in Foucault, 'Panopticism', pp. 195–228 and in Foucault, *The Birth of Biopolitics: Lectures at the Collège de France*, pp. 72–3, n. 25. For a study on the links between Bentham's Panopticon and Foucault, see Brunon-Ernst (ed.), *Beyond Foucault*. The Panopticon writings are found in: J. Bentham, *Panopticon; or The Inspection-House: Containing the Idea of a New Principle of Construction Applicable to Any Sort of Establishment, in which Persons of Any Description are to be Kept under Inspection*, in *The Works of Jeremy Bentham*, ed. J. Bowring, 11 vols (Edinburgh: William Tait, 1838–43), vol. 4, pp. 37–66; J. Bentham, *Postscript, Part I. Containing further Particulars and Alterations relative to the Plan of Construction Originally Proposed; Principally Adapted to the Purpose of a Panopticon Penitentiary-House*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 4, pp. 67–121; J. Bentham, *Postscript, Part II. Principles and Plan of Management*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 4, pp. 121–72. An amended version of the prison Panopticon is reproduced in J. Bentham, *Panopticon versus New South Wales: or, The Panopticon Penitentiary System, and the Penal Colonization System Compared. In a Letter Addressed to the Right Honorouble Lord Pelham*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 4, pp. 173–248. It was translated in French by Dumont in J. Bentham, *Le Panoptique*, ed. and trans. E. Dumont, *Archives parlementaires*, 36 (1791); and reprinted in J. Bentham, *Panoptique. Mémoire sur un nouveau principe pour construire des maisons d'inspection, et nommément des maisons de force*, ed. E. Dumont (Nantes: Editions Birnam, 1997). For a discussion on the differences between Bentham's prison Panopticon and Dumont's text, see A. Brunon-Ernst's 'Introduction' to the *Traité de legislation civile et pénale de Bentham*, ed. M. Bozzo-Rey, A. Brunon-Ernst and E. De Champs. The prison Panopticon was also republished by M. Bozovic in J. Bentham, *The Panopticon Writings*, ed. M. Bozovic (London: Verso, 1995); and with a postface by Foucault in Bentham, *Le Panoptique*. The pauper Panopticon is to be found in J. Bentham, *Pauper Management Improved*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 8, pp. 358–439. However, the latest scientific edition is now the reference for this corpus: J. Bentham, *Writings on the Poor Laws*, in *The Collected Works of Jeremy Bentham*, ed. M. Quinn, 2 vols (Oxford: Oxford University Press, 2001).
9. Evidence of Foucault's knowledge of Bentham's writings on the economics is to be found in Foucault, *The Birth of Biopolitics*, p. 24, n. 9 and p. 49, n. 12, which quotes material from J. Bentham, *Jeremy Bentham's Economic Writings*, ed. W. Stark, 3 vols (London: George Allen and Unwin, 1954).
10. Evidence of Foucault's knowledge of Bentham's writings on constitutional issues are found in Foucault, *The Birth of Biopolitics*, p. 73, n. 26. See also J. Bentham, *Constitutional Code*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 9; and J. Bentham, *Constitutional Code for the Use of all Nations and all Governments Professing Liberal Opinions*, in

Collected Works, ed. F. Rosen and J. H. Burns, vols 1– (Oxford: Clarendon Press, 1991), vol. 1. Hereafter *Constitutional Code* will refer to the *Collected Works* edition.

11. Bentham, *The Works of Jeremy Bentham*, ed. Bowring.
12. Bentham was aware of the dangers of his utilitarian enquiry in the field of sex: 'Never, surely ... did work appear from which, in the way of personal advantage and mischief – those words being taken in their ordinary sense – never one from which, in the way of reputation – never one from which at the hands of public opinion – a man found so much to fear, so little to hope' (UC MS, box 74, f. 38).
13. J. Bristow, *Sexuality, New Critical Idiom Series* (New York: Routledge, 1997).
14. Foucault, *History of Sexuality*, vol. 1, pp. 105–6.
15. M. Foucault, 'Sexual Choice, Sexual Act' (1982), in *Ethics*, ed. Rabinow, trans. Hurley et al., p. 141–2.
16. See for example Fraser, 'Foucault's Body Language', p. 8.
17. See for example Harrison, *Bentham*, pp. 154–61.
18. See J. Bentham, *An Introduction to the Principles of Morals and Legislation*, in *Collected Works*, ed. J. H. Burns, H. L. A. Hart and F. Rosen (Oxford: Clarendon Press, 1996), ch. 5, pp. 42–50.
19. Ibid., p. 11.
20. M. Foucault, *The History of Sexuality: The Use of Pleasure*, trans. R. Hurley, 3 vols (London: Penguin Books, 1992), vol. 2, p. 43.
21. M. Foucault, 'Sexuality and Solitude' (1981), in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 175–84, on p. 181.
22. Quoted above, pp. 12–13, and Harrison, *Bentham*, pp. ix–x.
23. See the Introduction and Harrison, *Bentham*, pp. ix–x.
24. Foucault, 'Sexual Choice, Sexual Act', p. 151.
25. The corpus on sexuality in Foucault is limited. Foucault published three volumes out of the five he planned for his *The History of Sexuality*. Volumes 4 and 5 are in manuscript form and have not yet been made available by Foucault's heirs. I will therefore draw on the three published volumes: (1) *The Will to Knowledge* in 1978; (2) *The Use of Pleasure* in 1985; and (3) *The Care of Self* in 1986. The contents of the planned two volumes of *The History of Sexuality* can be inferred from Foucault's last lecture series at the Collège de France (M. Foucault, *L'herméneutique du sujet. Cours au Collège de France. 1981–1982*, ed. F. Gros (Paris: Seuil, 2001); M. Foucault, *Le gouvernement de soi et des autres*, in *Cours au Collège de France. 1982–1983*, ed. F. Gros, 2 vols (Paris: Seuil, 2008), vol. 1; M. Foucault, *Le gouvernement de soi et des autres: Le courage de la vérité. Cours au Collège de France. 1984*, ed. F. Gros, 2 vols (Paris: Seuil, 2009), vol. 2). Added to these, Foucault gave interviews on the topic of sexuality, which are published in the *Essential Works of Foucault*.
26. P. Hirst, 'Foucault and Architecture', in Smart (ed.), *Michel Foucault: Critical Assessments*, vol. 4, p. 352.
27. Foucault, *History of Sexuality*, vol. 1, p. 59.
28. For further discussion on the concept of risk, see P. Slovic, 'Perception of Risk: Paradox and Challenge', in B. Brehmer and N.-E. Sahlin (eds), *Future Risks and Risk Management* (Dorrdrecht: Kluwer Academic Publishers, 1994), pp. 63–77; B. Brehmer, 'Some Notes on Psychological Research Related to Risk', in Brehmer and Sahlin (eds), *Future Risks and Risk Management*, pp. 79–91; R. Castel, *La gestion des risques, de l'anti-psychiatrie à l'après-psychanalyse* (Paris: Les éditions de minuit, 1981); U. Beck, *World at Risk*, trans. C. Cronin (Cambridge: Polity, 2009); U. Beck, *World Risk Society* (Cambridge: Polity Press, 1999); J.-F. Cauchie and G. Chantraine, 'De l'usage du risque dans le gouvern-

ment du crime', *Champ pénal / Penal field, nouvelle revue internationale de criminologie* [e-journal], 2 (2005), available online at <http://champpenal.revues.org/80> [accessed 18 June 2011]; J. Charbonnier, *Le risk management, Méthodologie et pratiques* (Paris: éditions L'Argus de l'assurance, 2007); R. C. Post (ed.), *Law and the Order of Culture* (Berkeley, CA: University of California Press, 1991).

29. B. Turner, 'The Disciplines', in Smart (ed.), *Michel Foucault: Critical Assessments*, vol. 4, pp. 372–85.
30. Foucault, *History of Sexuality*, vol. 1, p. 105.
31. Foucault shows how a pseudo-scientific method (originating in biology, medicine or psychoanalysis) helps to establish a type. The works of the sexologists seek to provide a comprehensive, albeit often fanciful, classification of sexual behaviours: see Krafft-Ebing, Otto Weininger, Karl Ulrich, Havelock Ellis, Iwan Bloch and Magnus Hirschfeld, among others, and also Edward Carpenter, who was not a sexologist but contributed to shaping knowledge on homosexuality. Among other books on the subject, see L. Bland and L. Doan (eds), *Sexology in Culture: Labelling Bodies and Desires* (Chicago, IL: Chicago University Press, 1998).
32. Foucault, *History of Sexuality*, vol. 1, p. 121–2.
33. Ibid., p. 120–1.
34. P. Rabinow and N. Rose, 'Biopower Today', *BioSocieties*, 1 (2006), pp. 195–217, on p. 212.
35. Foucault, 'Sexual Choice, Sexual Act', p. 151.
36. M. Foucault, 'Sade: Sergeant of Sex' (1975), in *Aesthetics, Method, and Epistemology*, ed. Faubion, trans. Hurley et al., vol. 2, p. 227.
37. Foucault, 'Sexual Choice, Sexual Act', p. 152.
38. Bentham's language is far from graphic, contrary to Foucault's. It could be possible to read in Bentham instances where parts of the body, which are not sexual organs, could be used for the performance of the sexual act. It seems nonetheless that this interpretation would be far-fetched for what is likely to be a description of sodomy. Bentham writes, in his list of possible sexual acts: 'Sexes, both concerned as before; but on the one side or the other the part of the body employed not susceptible of being contributory to impregnation, and thence regarded as improper' (UC MS, box 74, f. 46).
39. M. Foucault, 'Sex, Power, and the Politics of Identity' (1984), in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 163–74 , on p. 165.
40. P. Pasquino, 'Michel Foucault (1926–84): The Will to Knowledge', in Smart (ed.), *Michel Foucault: Critical Assessments*, vol. 4, p. 415.
41. B. Hindess, 'Liberalism, Socialism and Democracy: Variations on a Governmental Theme', *Economy and Society*, 22 (1993), pp. 300–13.
42. P. Barker, *Michel Foucault. An Introduction* (Edinburgh: Edinburgh University Press, 1998), p. 64.
43. Ibid., p. 28.
44. Ibid., p. 56.
45. B. Smart, 'Introductory Essay: The Government of Conduct – Foucault on Rationality, Power and Subjectivity', in Smart (ed.), *Michel Foucault: Critical Assessments*, vol. 4, p. 9.
46. Pasquino, 'Michel Foucault (1926–84)', p. 416. For a study of the conduct of conducts, see Foucault, *L'herméneutique du sujet*; Foucault, *Le gouvernement de soi et des autres*, vol. 1; Foucault, *Le gouvernement de soi et des autres: Le courage de la vérité*, vol. 2. Chapter 5, pp. 97–100 will develop the issue of ethics in a biopolitical world.
47. Foucault, 'Sex, Power, and the Politics of Identity', p. 163.

48. Ibid.
49. Foucault, 'Sexual Choice, Sexual Act', p. 153.
50. For an analysis of Foucault's friendships, see D. T. O'Hara and R. C. Newton, 'Michel Foucault and the Fate of Friendship', *Boundary 2*, 18:1 (1991), pp. 83–103; S. Garlick, 'The Beauty of Friendship: Foucault, Masculinity and the Work of Art', *Philosophy of Social Criticism*, 28:5 (2002), pp. 558–77.
51. E. Kosofsky Sedwick defines the homosocial as the social bonds between persons of the same sex, in *Between Men: English Literature and Male Homosocial Desire* (New York: Columbia University Press, 1985). J. Halberstam in *Female Masculinity* (Durham: Durham University Press, 1998) identifies the men's room as a space both of homosocial interaction and of homoerotic interaction.
52. Foucault, 'Friendship as a Way of Life', p. 136.
53. Foucault, 'The Social Triumph of the Sexual Will' (1981), in *Ethics*, ed. Rabinow, trans. Hurley et al., pp. 157–62, on pp. 161–2.
54. Foucault, 'Friendship as a Way of Life', p. 139.
55. Foucault, 'Sex, Power, and the Politics of Identity', p. 171: 'I think now, after studying the history of sex, we should try to understand the history of friendship, or friendships'.
56. Ibid., p. 170. For an example of this, see J. A. Symonds, *Memoirs of John Addington Symonds*, ed. P. Grosskurth (Chicago, IL: University of Chicago Press, 1984).
57. Foucault, 'Friendship as a Way of Life', p. 136.
58. The corpus of Bentham's writings on sex has not yet been consolidated. The first edition of a transcript of some of Bentham's manuscripts (Bentham manuscript boxes in the UCL library in London) was published by Crompton as 'Offences Against Oneself' in two consecutive issues of the *Journal of Homosexuality*. A second set of manuscripts entitled 'Sex' has been transcribed by Philip Schofield (Bentham Project, UCL) and is to be published by Stephen Engelmann. For the first ever published study on the 'Sex' corpus, see P. Schofield, 'Religion and Sex', in Schofield, *Bentham. A Guide for the Perplexed*, pp. 116–36. The London-based Bentham Project has been awarded funding to edit a volume of its *Collected Works* on Bentham's writings on sex but it will be many years before the volume is published. Nonetheless, I hope that the two texts this study is based on are sufficiently explicit to allow interesting and relevant conclusions on Bentham's thought on the matter to be drawn.
59. See Chapter 1, p. 20.
60. For Bentham, human happiness is nothing but the superiority of pleasure over pain: 'If pleasure be not an ingredient in the composition of happiness – a species and the only positive species of which happiness is made – exemption from pain being the only other species, and that but a negative one – then nothing is' (UC MS, box 74, f. 62).
61. UC MS, box 74, f. 39. See also Bentham, 'Offences Against Oneself', p. 2: 'I have been tormenting myself for years to find if possible a sufficient ground for treating them with the severity with which they are treated at this time of day by all European nations: but upon the principle utility I can find none'.
62. Bentham brushes away any rule established by the Christian religion on the basis that there is a discrepancy between what Paul says and Jesus's silence on these issues in the Bible. As the Christian religion is supposed to rely on what Jesus said, not Paul, whom Bentham calls the pseudo Apostle (UC MS, box 74, f. 81), any religious guidance on sex is a reinterpretation of what the true founder of the Church recommended (UC MS, box 74, f. 37).
63. UC MS, box 74, f. 39.
64. UC MS, box 74, f. 42.

65. Bentham explains the meaning of eulogistic and dyslogistic in *Springs of Action*. See J. Bentham, *Deontology, Together with A Table of the Springs of Action and Article on Utilitarianism*, in *Collected Works*, ed. A. Goldworth (Oxford: Clarendon Press, 1983).
66. UC MS, box 74, ff. 46–8. In 'Offences Against Oneself', Bentham identifies five classes, instead of eight: '1. Of the proper species but at an improper time: for instance, after death. 2. Of an object of the proper species and sex, and at a proper time, but in an improper part. 3. Of an object of the proper species but the wrong sex. This is distinguished from the rest by the name of paederasty. 4. Of a wrong species. 5. In procuring this sensation by one's self without the help of any other sensitive object'. Adultery, premarital sex and sodomy and so on are not included in this earlier list.
67. See also Bentham, 'Offenses Against Oneself', p. 17 and the following comment: 'If there be one idea more ridiculous than another, it is that of a legislator who, when a man and a woman are agreed about a business of this sort, thrusts himself in between them, examining situations, regulating times and prescribing modes and postures'.
68. Although, later in his writings, Bentham uses the term pederasty to refer to gay sex (UC MS, box 74, f. 188).
69. See also the expression 'between women' in Bentham, 'Offences Against Oneself', p. 16.
70. In Bentham's time, these acts fall under the categories of breach of the peace (Bentham, 'Offences Against Oneself', p. 3).
71. UC MS, box 74, f. 62.
72. See E. de Champs, 'Constitution and the Code: Jeremy Bentham on the Limits of Constitutional Branch of Jurisprudence', in A. Brunon-Ernst (ed.), *Tocqueville Review/La revue Tocqueville*, 32:1, Jeremy Bentham's Theory Today (2011), pp. 21–42.
73. For, as Bentham notes, 'unless attended with pleasure, [the act] is never is performed' (UC MS, box 74, f. 62).
74. UC MS, box 74, ff. 63–7.
75. UC MS, box 74, ff. 71.
76. UC MS, box 74, f. 72. In Blackstone, no difference is made between an act committed with violence (e.g. rape) and an act committed without (e.g. irregular act) as Bentham explains in Bentham, 'Offences Against Oneself', p. 3.
77. See Bentham's comment in UC MS, box 74, f. 77: 'The pleasures could not be reaped in perfection without more or less of impurity – physical impurity. But the sacrifice of this pleasure was the very reverse of impurity: it was purity itself'.
78. UC MS, box 74, ff. 75–82.
79. Bentham finds examples of antipathy in contemporary and classical literature (UC MS, box 74, ff. 95–6). He defines antipathy as 'the only antipathy by which any effect of a mischievous nature is produced, is that antipathy which, through the act, directs itself against the agent. Of the antipathy towards the act, a like antipathy towards the agent, howsoever frequent, is assuredly not a necessary and inseparable concomitant and consequence' (UC MS, box 74, f. 98). Antipathy is already a punishment in itself, and there is no need for any further punishment: 'the antipathy in question, so long as it subsists, draws with it in course, and without having recourse to the political magistrate, a very galling punishment, and this punishment is the heavier the greater the number of persons is by whom the antipathy is entertained and the more intense it is in each person' (Bentham, 'Offences Against Oneself', p. 15).
80. For Bentham 'Envy is emulation accompanied with antipathy' (UC MS, box 74, f. 99). In 'Offences Against Oneself' Bentham refers to antipathy and envy, neither of which are in any way grounds for punishment (p. 202).

81. UC MS, box 74, ff. 97–119.
82. Bentham identifies the roots of these passions in the difference of taste between people who harbour these passions and those who commit irregular sexual acts: 'Produced by contrariety of opinion or of taste, the appetite of vengeance is even more difficultly to be satiated or appeased than when produced by injury: in case of contrariety, if appeased at all, it is by manifestation or declaration of conformity that it must be appeased' (UC MS, box 74, f. 100).
83. UC MS, box 74, f. 84.
84. UC MS, box 74, ff. 129–37. See also 'With regard to the mere object of population, if we consider the time of gestation in the female sex we shall find that much less than a hundredth part of the activity a man is capable of exerting in this way is sufficient to produce all the effect that can be produced by ever so much more. Populations therefore cannot suffer till the inclination of the male sex for the female be considerably less than a hundredth part as strong as for their own. Is there the least probability that [this] should ever be the case? I must confess I see not any thing that should lead us to suppose it. Before this can happen the nature of the human composition must receive a total change and that propensity which is commonly regarded as the only one of the two that is natural must have become altogether an unnatural one' (Bentham, 'Offences Against Oneself', p. 6). Bentham thinks that monasteries have been far more injurious to the growth of population than paedastry (ibid., p. 7).
85. UC MS, box 74, ff. 138–46 and UC MS, box 74, f. 189: 'But in [the] case [of the solitary act in either sex] … the means of gratification being never wanting, the supposition of absence of mischief to health by excess is not so likely to be verified'.
86. UC MS, box 74, ff. 147–59.
87. UC MS, box 74, f. 190: 'Sexual intercourse between the opposite sexes without the sanction of marriage is productive of mischief and danger in a variety of shapes from which the like intercourse between two persons of the same sex, be it male or female, is free'. See also subsequent folios, which develop the argument.
88. See also Bentham, 'Offences Against Oneself', pp. 8–9, where Bentham states that women who would be affected in the event that male homosexuality be exercised without punishment are those who would be prevented from finding a husband on account of men's propensity for sex with men. But there are very few in this case, since the marriage state with a person of the other sex secures the benefits of a family, a connection of estate, a companion and easy access to sex. Moreover, if an individual is so little inclined to have sex with a female on account of his preference for men, he is unlikely to be a fit companion for a woman. Bentham writes: 'I can not suppose it to [be] possible it should ever get to such a height as that the interests of the female part of the species should be materially affected by it: or that it could ever happen that were they to contend upon equal ground the eccentric and unnatural propensity should ever get the better of the regular and natural one' (ibid., p. 9). Bentham adds that the husband only gives away the surplus to a female or male lover, and the wife should not be offended on that account (ibid., p. 11). Moreover, men only like young boys to the extent that they exemplify womanly beauties, ending when the pubescent boy grows into a male adult (ibid., p. 12). And Bentham concludes: 'The result of the whole is that there appears not any great reason to conclude that, by the utmost increase of which this vice is susceptible, the female part of the species could be sufferers to any very material amount' (ibid., p. 12).
89. UC MS, box 74, f. 197. See also Bentham, 'Offences Against Oneself', p. 9.
90. UC MS, box 74, ff. 206–11.

91. UC MS, box 74, f. 212.
92. Bentham, 'Offences Against Oneself', p. 3.
93. Ibid., p. 13.
94. Ibid., p. 16.
95. UC MS, box 74, f. 215.
96. Punishment itself can take several forms: '1. Punishment belonging to the legal or political sanction – legal punishment. 2. Punishment belonging to the popular or moral sanction – infamy. 3. Punishment belonging to the religious sanction – fear of hell torment. 4. Punishment of the political sanction inflicted on the innocent under the notion of their being guilty: *viz.* in consequence of false evidence. 5. Fear of punishment and infamy on this score in the breasts of delinquents – thus self-banishment. 6. Fear of punishment and infamy on this score in the breasts of non-delinquents. 7. Loss of the gratification through the fear of punishment in its several shapes – negative evil of restraint: loss of enjoyment. 8. Positive pain produced from the violence of the restraint' (UC MS, box 74, f. 179).
97. Ibid.
98. UC MS, box 74, f. 215.
99. UC MS, box 74, f. 219.
100. 'But these are precisely the only pleasures of sense which are as fully and effectually within the reach of the most indigent – supposing them by whatever cause collected together in adequate numbers – as within the most affluent classes of mankind: they are equally within the reach of the subject many as of the ruling few' (UC MS, box 74, f. 217).
101. Although in 'Sex', Bentham does seem to agree that too much masturbation may have enervating consequences, in 'Offences Against Oneself' he states that there are no grounds for such a belief: 'If the affirmative can be shewn it must be either by arguments *a priori* drawn from considerations of the nature of the human frame or from experience. Are there any such arguments from physiology? I have never heard of any: I can think of none' (Bentham, 'Offences Against Oneself', p. 4).
102. See L. Campos-Boralevi, *Bentham and the Oppressed* (Berlin: Walter de Gruyter, 1984). See also M. Sokol, *Bentham, Law and Marriage: A Utilitarian Code of Law in Historical Context* (London: Continuum, 2011).
103. 'If, therefore, it be the destiny of a wife to have a successful rival in the affections of her husband, she has much less to fear from one of his sex than from one of her own sex' (UC MS, box 74, f. 198).
104. Bentham does note that women are less free than men as regards their sexual practice, but he does not examine the roots of this difference (Bentham, 'Offences Against Oneself', p. 8).
105. UC MS, box 74, f. 190.
106. See Foucault, *History of Sexuality*, vol. 1, pp. 31–2. Commentators have criticized Foucault's lack of sympathy for the female victims of rape. See also J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2006), p. 94. On the issue of Foucault and feminism, the following articles are of note: B. Martin, 'Feminism, Criticism and Foucault', in I. Diamond and L. Quinby (eds), *Feminism and Foucault: Reflections on Resistance* (Boston, MA: Northeastern University Press, 1988), pp. 3–19; J. Butler, 'Variations on sex and Gender: Beauvoir, Wittig and Foucault', in S. Benhabib and D. Cornell (eds), *Feminism as Critique: Essays on the Politics of Gender in Late Capitalist Societies* (Cambridge: Polity Press, 1987), pp. 128–42; S. L. Bartkey, 'Foucault, Femininity, and Modernization of Patriarchal Power', in Diamond and Quinby (eds), *Feminism and Foucault*, pp. 61–86; J. Sawicki, 'Identity, Politics, and Sexual Freedom', in

Diamond and Quinby (eds), *Feminism and Foucault*, pp. 177–92; N. P. Ricci, 'End/s of Woman', *Canadian Journal of Political and Social Theory*, 11 (1987), pp. 11–27.

107. Criticism against Bentham's psychological foundations of his utilitarianism is widespread. See for example the following comment: 'As both psychological and ethical hedonism on which Bentham's principle of utility is based are untenable, Bentham's positive case for his principle must be rejected as untenable', in B. Parekh, 'Bentham's Justification of the Principle of Utility', in B. Parekh (ed.), *Jeremy Bentham: Ten Critical Essays* (London: Frank Cass, 1974), pp. 96–113, on p. 113.
108. See the Epilogue, pp. 127–34.
109. Foucault, *History of Sexuality*, vol. 1, pp. 122–3.
110. Ibid., pp. 83–5. For a definition of power as understood by Foucault's, see ibid., pp. 94–5. The source of the concept of repression Foucault criticizes is to be found in S. Marcus, *The Other Victorians: A Study of Sexuality and Pornography in Nineteenth-Century England* (London: Weidenfeld & Nicolson, 1966).
111. Power is not negative, it produces realities, as Smart explains in his 'Introductory Essay', p. 5.
112. Foucault, *History of Sexuality*, vol. 1, p. 156.
113. Ibid., p. 71: see 'the specific pleasure of the true discourse on pleasure'.
114. See ibid., pp. 101–2: 'There is no question that the appearance in nineteenth-century psychiatry, jurisprudence and literature of a whole series of discourses on the species and subspecies of homosexuality, inversion, pederasty and "psychic hermaphrodism" made possible a strong advance of social controls into this area of "perversity"; but it also made possible the formation of a "reverse" discourse: homosexuality began to speak in its own behalf, to demand its legitimacy or "naturality "'.
115. Smart, 'Introductory Essay', p. 5.
116. See Chapter 4, pp 70–80.
117. Foucault, *History of Sexuality*, vol.1, p. 157.
118. C. Gordon, 'The Soul of the Citizen: Max Weber and Michel Foucault on Rationality of Government', in S. Whimster and S Lash (eds), *Max Weber: Rationality and Modernity* (London: Allen & Unwin, 1987), pp. 293–316; republished in Smart (ed.), *Michel Foucault: Critical Assessments*, vol. 4, on p. 431.
119. Foucault, 'Sexual Choice, Sexual Act', p. 143.
120. V. Bell, 'The Promise of Liberalism and the Performance of Freedom', in A. Barry, T. Osborne and N. Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (London: UCL Press, 1996), pp. 81–97.
121. For a discussion on the the reproductive function of sex, see R. A. Nye, 'Love and Reproducing Biology in Fin de Siècle France: A Foucaultian Lacuna ?', in J. Goldstein (ed.), *Foucault and the Writing of History* (Oxford and Cambridge, MA: Blackwell, 1994).
122. Policy statements emanating from Western governments tend to include instructions that people should abstain from sex, limit the number of partners and be faithful to their partners, as well as information on condoms and the dangers of sharing needles. See for example http://www.unaids.org [accessed 1 February 2012].

2 Biopolitical Pain

1. M. Foucault, *Abnormal: Lectures at the Collège de France, 1974–5*, ed. F. Ewald and A. Fontana, trans. G. Burchell (New York: Picador, 2003), p. 138.
2. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 174.

3. M. Foucault, *The Birth of the Clinic* (London: Routledge, 1989), pp. 11, 15, 19 for example. *The Birth of the Clinic* is a book on dicourses on disease, without tackling the issue of pain per se.
4. J. R. Carrette (ed.), *Religion and Culture: Michel Foucault* (New York: Routledge, 1999), pp. 188–97, on the pleasures of fornification and the pains of being deprived of sexual relations.
5. Foucault, *History of Sexuality*, vol. 1, pp. 104–5.
6. Foucault, *Discipline and Punish*, p. 3.
7. Ibid., pp. 257–63.
8. Ibid., p. 263.
9. See what Foucault writes in *Discipline and Punish*, p. 16: 'There remains, therefore, a trace of "torture" in the modern mechanisms of criminal justice – a trace that has not been entirely overcome, but which is enveloped, increasingly in the non-corporal nature of the penal system'.
10. Ibid., p. 34. Foucault explains: 'To be torture, punishment must ... produce a certain degree of pain, which may be measured exactly, or at least calculated, compared and hierarchized ... Torture correlates the type of corporal effect, the quality, intensity, duration of pain, with the gravity of the crime, the person of the criminal, the rank of his victims', ibid., pp. 33–4.
11. C. Beccaria, *Traité des délits et des peines par Beccaria, traduit de l'italien par André Morellet: nouvelle édition corrigée; précédée d'une Correspondance de l'Auteur avec le Traducteur; accompagnée de notes de Diderot, et suivie d'une Théorie des Lois Pénales, par Jérémie Bentham, traduite de l'anglais par Saint-Aubin*, trans. A. Morellet (Paris, an V [1797]).
12. Foucault, *Discipline and Punish*, p. 92.
13. On the concept of police in Foucault, see B. Barret-Kriegel, 'Michel Foucault et l'Etat de police', in *Michel Foucault philosophe. Rencontre internationale Paris 9, 10, 11 janvier 1988* (Paris: Seuil, 1989).
14. Foucault, *Discipline and Punish*, pp. 94–9.
15. Beccaria, *Traité des délits et des peines*; and J.-P. Brissot de Warville, *De la vérité ou méditations sur les moyens de parvenir à la vérité dans toutes les connaissances humaines* (Paris, 1782). For a detailed study, see B. Inglis, *Poverty and the Industrial Revolution* (London: Hodder & Stoughton, 1971).
16. Brunon-Ernst, *Le Panoptique des pauvres*; Brunon-Ernst (ed.), *Beyond Foucault*. See also the definition of the Panopticon in *Beyond Foucault* on p. 37: 'The Panopticon is the name given to a building developed by Jeremy Bentham which allows most of the activities of the inmates to be seen, and thus monitored, by the institution's accredited viewer(s) in order to compel the inmates to behave in a fashion conducive to the maximal degree of realization of the specific ends which the institution is intended to achieve. This principle in architecture can then be supported by an array of non-architectural arrangements which strengthen the likelihood of compliance with the norms set by the institution.'
17. Bentham, *Panopticon; or The Inspection-House*, p. 39.
18. Foucault, *Discipline and Punish*, p. 177.
19. M. Foucault, 'Truth and Juridical Forms' (1973), in *The Essential Works of Michel Foucault, 1954–1984, Volume 3: Power*, ed. P. Rabinow, trans. R. Hurley et al., pp. 1–89, on p. 58.
20. Foucault, *Discipline and Punish*, p. 167.
21. Ibid., p. 220.
22. Brunon-Ernst, *Le Panoptique des pauvres*, pp. 79–83.

23. Ibid., p. 96–105.
24. Ibid., p. 105–12.
25. Foucault, *Discipline and Punish*, p. 220.
26. Brunon-Ernst, *Le Panoptique des pauvres*, pp. 95–6.
27. Foucault, *Discipline and Punish*, p. 199.
28. S. Legrand, *Les normes chez Foucault* (Paris: Presses Universitaires de France, 2007), p. 8.
29. Ibid., p. 4.
30. See Chapter 1, p. 18; Chapter 2, pp. 33–5.
31. Legrand, *Les normes chez Foucault*, pp. 278–9.
32. Ibid., p. 289.
33. Ibid., p. 288.
34. G. Becker, *The Economic Approach to Human Behaviour* (Chicago, IL: Chicago University Press, 1976), pp. 39–89.
35. Legrand, *Les normes chez Foucault*, pp. 291–6. For Foucault's source on norms, see G. Canguilhem, *Le normal et le pathologique*, 11th edn (1966; Paris: Presses Universitaires de France, 2009).
36. On punishment, see D. Garland, *Punishment and Modern Society. A Study in Social Theory* (Oxford: Clarendon Press, 1990); D. Garland, 'Frameworks of Inquiry in the Sociology of Punishment', *British Journal of Sociology*, 41:1 (1990), pp. 1–15.
37. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 38.
38. Ibid., p. 34.
39. See Cléro, 'Foucault et l'Utilitarisme'.
40. See M. Quinn, 'The Fallacy of Non-Interference: The Poor Panopticon and Equality of Opportunity', *Journal of Bentham Studies* [e-journal], 1 (1997), available online at <http://www.ucl.ac.uk/Bentham-Project/journals> [accessed 14 January 2012].
41. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 34.
42. Ibid., p. 42.
43. Foucault notes that a prison sentence, even if it aimed at producing the psychological pain of deprivation of freedom, was never intended without physical pain. He writes: 'a punishment like forced labour or even imprisonment – mere loss of liberty – has never functioned without a certain additional element of punishment that certainly concerns the body itself: rationing of food, sexual deprivation, corporal punishment, solitary confinement ... imprisonment has always involved a certain degree of physical pain' (Foucault, *Discipline and Punish*, pp. 15–6).
44. Bentham does not seem to consider that other criminals might not sympathize with the convict, but rather rejoice at the idea that a competitor has been taken out of the criminal market.
45. Foucault, *Discipline and Punish*, pp. 3–6.
46. Ibid., p. 286.
47. Brunon-Ernst, 'Le vocabulaire benthamien, pp. 95–118.
48. See Chapter 1, pp. 15–20, 20–4; and Chapter 2, pp. 31–7, 37–40.
49. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 42. See above, p. 39.
50. Ibid., pp. 42–50.
51. See Chapter 1, pp. 26–9.
52. Foucault, *Abnormal*, p. 138.
53. In Freud's second topography, the ego, on account of its close contact with the world, is the seat of the reality principle. The id, which is the most deeply unconscious part of the

psyche, is home to the pleasure principle. This terminology appears in both of Freud's topographies: that of the 1910s and that of the 1920s, his 1923 *The Ego and the Id* being generally viewed as the turning point. Various agents in the psyche, whether they are named the conscious, the subconscious and the unconscious, or the ego, the id and the superego (not that these two tripartite divisions are different names for the same agents) are viewed as dynamic agents which respond to the stimuli of the external world, are enmeshed in drives, or act as a go-between all these different agencies.

54. Foucault, *Abnormal*, p. 299.
55. Ibid., p. 150.
56. Ibid., p. 137.
57. Ibid., p. 113.
58. Ibid., p. 138.
59. S. Freud, *Beyond the Pleasure Principle*, in *On Metapsychology* (Harmondsworth: Penguin, 1991), pp. 271–338.
60. S. Freud, 'Instincts and their Vicissitudes', in J. Starchey and al. (eds), *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume 14* (London: Hogarth Press and the Institute of Psycho-Analysis, 1914), pp. 117–40.
61. For valuable secondary literature on Freud see T. Thwaites, *Reading Freud: Psychoanalysis as Cultural Theory* (London: Sage, 2007); E. Wright, *Psychoanalytic Criticism: Theory in Practice* (London: Methuen, 1984); L. Bersani, *The Freudian Body* (New York: Columbia University Press, 1986); S. Weber, *The Legend of Freud* (Minneapolis, MN: University of Minnesota Press, 1982), M. Ellmann, *Psychoanalytic Literary Criticism* (London: Longman, 1994). Other psychoanalysts and literary critics have also commented on the works of Freud; see J. Derrida, *The Postcard: From Socrates to Freud and Beyond* (Chicago, IL: University of Chicago Press, 1987), J. Laplanche and J. P. Pontalis, *The Language of Psychoanalysis* (London: Karnac, 1988), J. Laplanche, *Life and Death in Psychoanalysis* (Baltimore, MD: Johns Hopkins, 1976).
62. S. Freud, 'Fetishism', in *On Sexuality: Three Essays on the Theory of Sexuality and Other Works* (Harmondsworth: Penguin, 1977), pp. 345–57; and S. Freud, 'On the Universal Tendency to Debasement in the Sphere of Love', in *On Sexuality*, pp. 243–60.
63. Foucault, *Abnormal*, pp. 162–3.
64. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 11.

Part II: Utilitarian Conduct of Conduct

Introduction: Legal Norms, Extra-Legal Norms and Utilitarian Conduct

1. M. Foucault, 'The Ethics of the Concern for Self as a Practice of Freedom', in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 281–302, on pp. 291–2.
2. J. Bentham, 'Economy as Applied to Office', in *First Principles Preparatory to the Constitutional Code*, in *Collected Works*, ed. Rosen and Schofield, pp. 1–122, on p. 30.
3. Dinwiddy, *Bentham*, p. 30–1.
4. D. Baumgardt, *Bentham and the Ethics of Today* (Princeton; NJ: Princeton University Press, 1952), p. 374.
5. Schofield, 'Jeremy Bentham: Legal Philosopher and Political Reformer', p. 4; Halévy, *La formation du radicalisme philosophique*, vol. 1, p. 55.

6. Dinwiddy, *Bentham*, p. 29.
7. James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), p. 15.
8. Harrison, *Bentham*, p. 109.
9. James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), p. 14.
10. Dube, *The Theme of Acquisitiveness*, p. 91.
11. Harrison, *Bentham*, p. 152.
12. Ibid., p. 154.
13. J. Bentham, *Of Laws in General*, in *The Collected Works of Jeremy Bentham*, ed. H. L. A. Hart (London: Althone Press, 1970), p. 156; and J. Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, in *The Collected Works of Jeremy Bentham*, ed. P. Schofield (Oxford: Oxford University Press, 2010), p. 42 n.a.
14. Foucault, 'La société punitive', in J. Lagrange (transcription), *Annuaire du collège de France, 73e année, Histoire des systèmes de pensée*, republished in M. Foucault, *Dits et Ecrits* (Paris: Gallimard, 1994), vol. 2, p. 59.
15. J. Bentham, *Securities Against Misrule*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 8, pp. 555–600, on pp. 561–72.
16. D. G. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in relation to his Utilitarianism* (Toronto: Toronto University Press, 1977), p. 136.

3 Law, Norm and the Control of Conduct

1. C. Laval proposes a similar analysis in Brunon-Ernst (ed.), *Beyond Foucault*, ch. 2, pp. 43–60.
2. Foucault, *The Birth of Biopolitics*, p. 28.
3. Ibid. For a comparative analysis of the meaning of the word 'frugal' in Bentham's and Foucault's terminology, see Brunon-Ernst, 'Le vocabulaire benthamien'.
4. Foucault, *Discipline and Punish*.
5. Brunon-Ernst, 'Introduction: Foucault est-il utilitariste?'.
6. See Laval, 'Ce que Foucault a appris de Bentham'. For studies critical of Bentham, see Himmelfarb, 'The Haunted House of Jeremy Bentham'; Himmelfarb, 'Bentham's Utopia: The National Charity Company', *Journal of British Studies*, 10 (1970), pp. 80–125; Himmelfarb, *The Idea of Poverty*; and Bahmueller, *The National Charity Company*.
7. On panopticism and its uses, see Brunon-Ernst, *Le Panoptique des pauvres*.
8. On the origin of the Panopticon, see I. Christie, *The Benthams in Russia, 1780–91* (Oxford: Berg, 1993).
9. Foucault, *The History of Sexuality*, vol. 1, p. 91. See also M. Foucault, 'Truth and Power', in *Power*, ed. Rabinow, trans. Hurley et al., p. 122.
10. Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, p. 24 (my emphasis). Upcoming translation: M. Bozzo-Rey, *Des limites de la branche pénale de la jurisprudence*, followed by *Au-delà de l'utilitarisme: droit et politique chez Jeremy Bentham* (Paris: Classiques Garnier, forthcoming). *Limits* (2010) is the edition of *Of Laws in General* (1970), revised by Philip Schofield, the version of which had been established by H. L. A. Hart. To this day, no translation of these texts has been published. Bozzo-Rey translated *Of Laws*, as part of his PhD thesis ('Statut du principe d'utilité dans la pensée de Jeremy Bentham', Thèse de Doctorat, Paris Ouest-Nanterre-La Défense University, 2007). Besides the reorganization of the text, there are signifi-

cant differences in the choice of the manuscripts that must be included in *Limits* and in the accuracy of the transcription of the manuscripts upon which the text is founded. See P. Schofield, 'A Manuscript's Odyssey', a paper given at the conference upon *Of the Limits of the Penal Branch of Jurisprudence*, Ecole de Droit, Science Po, Paris, 18–19 April, 2011.

11. Laval, 'Ce que Foucault a appris de Bentham'.
12. See in particular the six volumes edited by Smart of *Michel Foucault: Critical Assessments*; and G. Agamben, *Homo Sacer. Sovereign Power and Bare Life*, trans. D. Heller-Roazen (Stanford, CA: Stanford University Press, 1998).
13. See in particular M. Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999); Barry, Osborne and Rose (eds), *Foucault and Political Reason. Liberalism*; and G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991).
14. A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994); and B. Golder and P. Fitzpatrick, *Foucault's Law* (Abington: Routledge, 2009).
15. M. Cicchini and M. Porret, *Les sphères du pénal. Avec Michel Foucault Histoire et sociologie du droit de punir* (Lausanne: éditions Antipodes, 2007).
16. N. Poulantzas, B. Fine, P. Hirst, C. Smart, D. Kennedy and B. de Sousa Santos also support that approach.
17. M. Shildrick, M. Ogborn, N. Rose, M. Valverde, D. Ivison and A. Beck, in English-speaking countries and F. Ewald in France also support this view. See for example, A. Beck, 'Foucault and Law: The Collapse of Law's Empire', *Oxford Journal of Legal Studies*, 16 (1996), pp. 489–502, on p. 489; D. Ivison, 'The Technical and Political: Discourses of Race, Reasons of State', *Social and Legal Studies*, 7 (1998), pp. 561–6, on p. 561; N. Rose and M. Valverde, 'Governed by Law?' *Social and Legal Studies*, 7 (1998), pp. 541–51, on p. 541.
18. F. Ewald, 'Norms, Discipline and the Law', trans. M. Beale, in Post (ed.), *Law and the Order of Culture*, pp. 138–61, on p. 138.
19. See the methodology used by Golder and Fitzpatrick. These two university professors examine the three periods in Foucault's thought (discipline/governmentality-biopolitics/techniques of the self) and manage to solve the apparent inconsistencies of his conception of law by referring to his last writings on ethics.
20. Foucault would have refused that the word 'theory' be applied to his work, for he refused to have a programmatic discourse. See Foucault, 'Friendship as a Way of Life', p. 139.
21. A. L. Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham; NC: Duke University Press, 1995), p. 38.
22. Hunt and Wickham, *Foucault and Law*, p. 40.
23. Golder and Fitzpatrick, *Foucault's Law*, pp. 29–35.
24. Ibid., pp. 66–8.
25. Ibid., p. 68.
26. Ibid., p. 69.
27. Ibid., p. 33. See Ewald, 'Norms, Discipline and the Law', p. 141.
28. Biopolitics is only concerned with the aspects of individual behaviours having a global effect on the population. Legrand, *Les normes chez Foucault*, p. 282.
29. Ibid., p. 272.
30. Ewald, 'Norms, Discipline and the Law', pp. 155–8.

31. Golder and Fitzpatrick, *Foucault's Law*, pp. 71–2.
32. Legrand's work makes it possible to think of several ways in which the norm works within the political authority (norm/normation/normativation), which other philosophers working on that point do not. See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979); J. Raz, *Practical Reasons and Norms* (Princeton, NJ: Princeton University Press, 1990); J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986). Ben-Dor gives a definition of the concepts of normative and normativity: the feeling an individual has of being under some obligation is normative, normativity being the idea of the justification of that feeling (O. Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (Oxford: Hart Publishing, 2000), p. 39).
33. Legrand, *Les normes chez Foucault*, p. 8.
34. E. Durkheim, *Les règles de la méthodologie sociologique, 1894* (1894; Paris: Flammarion, 1988), pp. 103–4.
35. Legrand, *Les normes chez Foucault*, p. 11.
36. Ibid., p. 12. See Ewald, 'Norms, Discipline and the Law', pp. 141, 148 where the norm also appears as a space of transactions.
37. Legrand, *Les normes chez Foucault*, p. 58. See also M. A. Paternek, 'Norms and Normalization: Michel Foucault's Overextended Panoptic Machine', *Human Studies*, 10:1 (1987), pp. 97–121.
38. Legrand, *Les normes chez Foucault*, p. 59.
39. Ibid., p. 60.
40. Ewald also takes an interest in the working of the norm in the disciplinary domain (Ewald, 'Norms, Discipline and the Law', p. 141).
41. Legrand, *Les normes chez Foucault*, pp. 73–4. Ewald distinguishes different logics in the normative process. The panopticistic logic of the disciplinary environment, the probabilistic logic of the insurance world and the communicational logic of technical standards (Ewald, 'Norms, Discipline and the Law, p. 154). See Chapter 2, p. 32–4.
42. Legrand, *Les normes chez Foucault*, pp. 108–10.
43. Ibid., p. 135. See also p. 138: 'the counter law in which are relegated those who are not normal, those who are outside the normal order that the legal norms presuppose in order to be applicable, is the condition of existence of the law, at the same time as it is the outside by the exclusion of which the 'normality' establishes and insures itself'. This divide is also that of the usefulness and uselessness of a social part of the population (ibid., p. 141).
44. Legrand adds that the life of a prisoner is an 'ongoing trial', since prison is the place where the sentence that has been decided by a judge is adapted to the prisoner depending on the improvements or worsening of his behaviour. See ibid., p. 140.
45. Ibid., p. 135.
46. Ibid., p. 47. See also Foucault, 'La société punitive', p. 59.
47. Legrand, *Les normes chez Foucault,* p. 155.
48. Ibid., p. 218.
49. Ibid., p. 154. See also p. 277 which sums up the opposition between normative process and normalization.
50. Ibid., p. 218.
51. Ibid., p. 150.
52. Ibid., p. 160.
53. Golder and Fitzpatrick, *Foucault's Law*, pp. 99–139.
54. Ibid., p. 101.

55. Ibid.
56. Ibid., p. 109–10.
57. Ibid., pp. 107–24. See M. Foucault, *Le Gouvernement de soi et des autres*, and Foucault, *Le courage de la vérité: Le Gouvernement de soi et des autres II*.
58. Golder and Fitzpatrick, *Foucault's Law*, p. 112.
59. Ibid., pp. 113–4, 117.
60. Ibid., p. 115.
61. Ibid., p. 101.
62. On the difference between biopower and biopolitics, see ibid., pp. 32–5, and p. 44, n. 51.
63. For a study of the forms that such a resistance may take, see Chapter 1, pp. 11–13, 18, 26.
64. Golder and Fitzpatrick, *Foucault's Law*, p. 117.
65. Ibid., p. 121.
66. Foucault, 'Friendship as a Way of Life', p. 139.
67. See Chapter 1, pp. 11–13, 18, 26.
68. Three essays in particular theorize the notion of resistance, which are not academic articles but interviews: 'Friendship as a Way of Life', which was published in the magazine *Gai Pied* 'Sexual Choice, Sexual Acts', which was published in the special issue of *Salmagundi* on homosexuality and 'Sex, Power and the Politics of Identity', which was published in the *Advocate* (all three essays are to be found in *Ethics*: pp. 135–40; pp. 141–56; pp. 163–73).
69. Foucault, 'Sex, Power, and the Politics of Identity', pp. 164, 166.
70. Agamben refutes Foucault's interpretation which founds the power of the sovereign on the right to life and death of his/her subjects. Agamben thinks that the power of the sovereign lies in the right to exclude. See Agamben, *Homo Sacer*, pp. 8–28. See also Ojakangas, 'Impossible Dialogue on Bio-power'.
71. Ewald, 'Norms, Discipline and the Law', p. 155.
72. Ibid., p. 156.
73. Ibid., p. 157.
74. Ibid., p. 158.
75. Ibid., p. 155.
76. Ibid.
77. Foucault, 'La société punitive', p. 59; Bentham, *Of Laws*, p. 156; and Bentham, *Of the Limits*, p. 42 n.a.
78. Foucault, *The History of Sexuality*, vol. 1, p. 91.
79. Bentham, *Of the Limits*, p. 24 (my emphasis).
80. M. Foucault, *Security, Territory, Population, Lectures at the Collège de France, 1977–1978*, ed. A. I. Davidson, trans. G. Burchell (Basingstoke: Palgrave MacMillan, 2007), p. 11.
81. Bentham, *Of the Limits*, p. 42.
82. Ibid., p. 29.
83. Ibid., p. 32. Hart criticizes such an extension of the meaning of the law in Bentham's work, because according to him it reduces the operation of legal norms. See H. L. A Hart, *Essays on Bentham: Studies on Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), p. 224, and Raz, *The Authority of Law*, pp. 14–20.
84. Bentham, *Of the Limits*, p. 47: '[on the nature of a mandate] Trivial or important makes no difference'.
85. Bentham used the words 'mandate' and 'law' indiscriminately, especially because the word 'mandate' has a much broader meaning than law and therefore allowed him to overcome the unwillingness of his reader to accept such an extensive definition of the

law (ibid., p. 37). Mandates are legal or illegal. When Bentham used the word mandate without qualifying it, it should be understood as a legal one (ibid., p. 48).

86. Ibid., p. 47.
87. Ibid., p. 45.
88. Ibid.
89. Ibid., p. 209: 'for a judgement, in the sense in which it is an expression of will, is a kind of occasional law, an order made upon such or such persons requiring them to do so and so: requiring them in the present case to comport themselves so and so for the benefit of the plaintiff'. As it integrates the power of imperation, Bentham's theory makes it possible to understand the shift from the edict of the sovereign to the ruling of the judge, which shift was not conceptualized in John Austin's thought, for example. See G. Tusseau, 'Positivist Jurisprudents Confronted: Jeremy Bentham and John Austin on the Concept of a Legal Power', *Revue d'études benthamiennes* [e-journal], 2 (2007), available online at <http://etudes-benthamiennes.revues.org/130> [accessed 17 August 2011].
90. See paragraph 9, entitled 'Of the local extent which a law may have' (Bentham, *Of the Limits*, pp. 94–5).
91. See paragraph 10, entitled 'Of the duration of a law' (ibid., pp. 96–7).
92. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 301; Bentham, *Of Laws*, pp. 12, 143–4, 154–5; J. Bentham, *Pannomial Fragments*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, pp. 211–30, on p. 215; Bentham, *Of the Limits*, pp. 34–5.
93. G. Tusseau, 'Jeremy Bentham on Power-Conferring Laws', *Revue d'études benthamiennes* [e-journal], 3 (2007), available online at <http://etudes-benthamiennes.revues.org/160> [accessed 17 August 2011].
94. For a discussion on the correct translation of the word, see Bozzo-Rey et al., 'La traduction de *l'Introduction to the Principles of Morals and Legislation* par le Centre Bentham'.
95. H. Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940–41* (Cambridge, MA: Harvard University Press, 1942), pp. 19–20.
96. Bentham, *Of the Limits*, pp. 75–6.
97. Foucault, 'Sex, Power, and the Politics of Identity', pp. 163–73; G. Deleuze, *Foucault*, trans. S. Hand (London: Continuum, 1999), p. 74; M. Hardt and A. Negri, *Multitude: War and Democracy in the Age of Empire* (London: Hamish Hamilton, 2004), p. 64.
98. Bentham found the source of a law in an infraction, as a consequence laws are ordered depending on the kind of infraction (Bentham, *Of the Limits,* p. 57). The aim of a law is therefore to be found in the sort of infraction it prohibits (ibid., p. 57), and each ruling presupposes (in penal law) or creates (in civil law) an infraction (ibid., p. 213–4).
99. Bentham thought that sanction came first in the work of the government. See Bentham, *Of the Limits*, p. 144n. Bentham also explained that the concept of law is linked to that of coercion (ibid., p. 145, and n.). The reason for that is that the law is based upon the motives to transform an expression of the will into an act (ibid., p. 142). These motives are not only coercive, for they may also rely upon the pleasure that an individual hopes they will draw from an action. However, rewards can never be enough (ibid., p. 144). UN Security Council resolutions should be distinguished from UN General Assembly resolutions.
100. Ewald, 'Norms, Discipline and the Law', p. 155.
101. Bentham, *Of the Limits*, p. 108.
102. Bozzo-Rey, 'Le statut du principe d'utilité dans la philosophie politique de Jeremy Bentham', p. 305.

103. Hart, *Essays on Bentham*; D. Lyons, *In the Interest of the Governed* (Oxford: Oxford University Press, 1973) and J. Raz, *Concept of a Legal System* (Oxford: Oxford University Press, 1980).
104. Bozzo-Rey, 'Le statut du principe d'utilité dans la philosophie politique de Jeremy Bentham', p. 306.
105. G. Tusseau, *Les normes d'habilitation*, pref. M. Troper (Paris: Dalloz, 2006).
106. For a study on the contradictions that are inherent to this assertion, see Tusseau, 'Jeremy Bentham on Power-Conferring Laws'. Defining the content of a legal norm comes back to the question of the determination of the branches of the law (criminal, civil and constitutional). On this point see A. Brunon-Ernst, 'Délimiter la branche civile du droit: Bentham et la quête impossible', in G. Tusseau and M. Bozzo-Rey (eds), *Bentham, juriste* (Paris: Economica, 2010), pp. 177–200.
107. See Chapter 2, p. 36.
108. Bentham, *Of the Limits*, p. 220.
109. Ibid., p. 186.
110. Ibid. p. 38; Hart criticizes Bentham's mixing lawfulness and validity. See Hart, *Essays on Bentham*, p. 224 and Tusseau, 'Jeremy Bentham on Power-Conferring Laws', para. 77–81.
111. Bentham, *Of the Limits*, p. 172.
112. Ibid., p. 57.
113. Ibid., p. 224. Bozzo-Rey's thesis is that Bentham could contruct a theory of the legal norm – that is, based upon the logic of the will and not upon utility. However, utility is still the content of the normative clause in Bentham's legal system (see Bozzo-Rey, 'Le statut du principe d'utilité dans la philosophie politique de Jeremy Bentham').
114. Bentham drew a well-known distinction between the level of prescriptive and descriptive discourse, which he called *censorial* and *expository*. See Bentham, *Of the Limits*, pp. 16–23.
115. Ibid., p. 229.
116. Ibid., p. 223.
117. Foucault, *The Birth of Biopolitics*.
118. In *Les normes chez Foucault* Legrand explains that the norms in Foucault's work are based upon a universal norm, which presupposes equal subjects by right (pp. 73–4). See Ewald, 'Norms, Discipline and the Law', p. 154.
119. Bentham, *Of Laws*, p. 156; and Bentham, *Of the Limits*, p. 42 n.a.
120. Foucault, 'La société punitive', p. 59.
121. See in particular Ben-Dor, *Constitutional Limits and the Public Sphere*; James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973); G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986); Lyons, *In the Interest of the Governed*; Raz, *The Morality of Freedom*; Raz, *The Authority of Law*; Raz, *Practical Reason and Norms*; Kelly, *Utilitarianism and Distributive Justice*; Hart, *Essays on Bentham*.
122. Hart, *Essays on Bentham*, pp. 252–7.
123. Postema, *Bentham and the Common Law Tradition*, pp. 238–9.
124. Ben-Dor, *Constitutional Limits and the Public Sphere*, p. 49.
125. Ibid., p. 53.
126. Ibid., p. 49.
127. Ibid., p. 53, and Bentham, *Of Laws*, pp. 68–9n. and p. 91.
128. Ben-Dor, *Constitutional Limits and the Public Sphere*, p. 54.
129. Ibid., p. 55.
130. Foucault, *Security, Territory, Population*, p. 71.
131. Ibid., p. 73.
132. Foucault, *The Birth of Biopolitics*, p. 28. See also Chapter 6, p. 108.

4 The Secret Monitoring Plan

1. Bentham, *Of the Limits*, p. 233.
2. Foucault, 'Le sujet et le pouvoir', in *Dits et écrits* (Paris: Gallimard, 1994), vol. 5, p. 237. [This excerpt is not reproduced in Foucault, 'The Subject and Power', in *Power*, pp. 326–48.]
3. This point is developed in the following chapter. See Chapter 5, p. 92–7.
4. S. G. Engelmann, '"Indirect Legislation": Bentham's Liberal, Government', *Polity*, 35:3 (2003), pp. 372–3. Bentham's *Introduction* contains sixteen chapters. Chapter 17 was extended into *Of Laws in General*, now published as *Limits of the Penal Branch of Jurisprudence*, and deals with the differences between civil and criminal law, basing itself on the analysis of what 'a law' is. Chapter 18 was meant to be on means to prevent crimes, that is, the 'preventive' branch of legislation, otherwise known as 'indirect legislation', but it was never published.
5. J. Bentham, *Principles of the Penal Code*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 1, pp. 533–80.
6. Bentham, *Traités de legislation civile et pénale*, ed. Bozzo-Rey, Brunon-Ernst and De Champs (Paris: Dalloz, 2010), p. 341; my translation.
7. For a discussion on how panopticism can be read as foreshadowing biopolitical power, read Laval, 'Ce que Foucault a appris de Bentham'.
8. Ibid.
9. Bentham, *Traités de legislation civile et pénale,* pp. 331–405.
10. Ibid., p. 392–402.
11. Engelmann, '"Indirect Legislation": Bentham's Liberal, Government', pp. 369–88.
12. J. Bentham, *Principles of the Civil Code*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 1, pp. 297–364, on p. 302. Bentham's purpose is the same throughout his career. See for example, a 1786 manuscript: 'Quatre buts du droit distributif privé – 1. Subsistance. 2. Abondance. 3. Sûreté. 4. Egalité' (UC MS, box 99, f. 32) and an 1827 manuscript: 'rights are 1. of subsistence. 2. of abundance. 3. of security. 4. Of equality' (UC MS, box 30, f. 26). See also Brunon-Ernst, 'Délimiter la branche civile du droit', pp. 182–4.
13. Bentham, *Principles of the Civil Code*, p. 302. See also J. Bentham, *First Lines of a Proposed Code of Laws for any Nation Compleat and Razionalized* (in *Legislator of the World*, in *The Collected Works of Jeremy Bentham*, ed. P. Schofield and J. Harris (Oxford: Oxford University Press, 1998), pp. 187–239, on pp. 194–5; and manuscript sources, among which UC MS, box 37, f. 53, written in 1821.
14. Bentham, *Traités de legislation civile et pénale*, p. 343.
15. Ibid., pp. 341–2.
16. UC MS, boxes 87 and 62.
17. J. Bentham, *Political Tactics*, in *The Collected Works of Jeremy Bentham*, ed. M. James, C. Blamires and C. Pease-Watkin (Oxford: Clarendon, 1999); Bentham, *Legislator of the World*; Bentham, *Securities Against Misrule*; Bentham, *First Principles Preparatory to the Constitutional Code*; and Bentham, *Constitutional Code for the Use of All Nations*.
18. Foucault, *Security, Territory*, *Population*, pp. 45.
19. Laval, 'Ce que Foucault a appris de Bentham'.
20. Foucault, *The Birth of Biopolitics,* pp. 44–6.
21. See the Preamble to the American Constitution (1789).
22. See for example 'By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuad-

ing them from it' (A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. C. J. Bullock (New York: P. F. Collier & Son, 1909), p. 352).

23. 'In the breast of every sensitive being, the general predominance of self-preference: for proof take the existence of the species: look, and you will see, that upon such predominance the species is absolutely dependent for its existence', in Bentham, 'Economy as Applied to Office', pp. 27, 43.
24. Ibid., p. 27.
25. See J.-J. Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (New York: E. P. Dutton, 1950), pp. 92–6.
26. Bentham's use of the term 'trustee' is far from innocent. Bentham challenges the Lockeian contractual vision of government (See J. Locke, *Two Treatises on Civil Government* (London: George Routledge & Sons, 1884), p. 41). For Bentham, the only source of power is the people (named the Supreme Constitutive). Civil servants and members of the representative assembly (named functionaries) are only trustees of the power of the people. See for example Bentham, 'Economy as Applied to Office', p. 3.
27. Bentham, *Traités de legislation civile et pénale*, p. 392; my translation.
28. For detailed studies of Bentham's utilitarian government, see: E. de Champs, 'Les fonctionnaires dans le *Code Constitutionnel*', *Revue d'études benthamiennes* [e-journal], 1 (2006), available online at <http://etudes-benthamiennes.revues.org/59> [accessed 1 October 2011]; A. Guillot, 'Le peuple chez Bentham', *Revue d'études benthamiennes* [e-journal], 5 (2009), available online at <http://etudes-benthamiennes.revues.org/91> [accessed 10 October 2011]; C. Chauvet, 'La notion d'égalité des chances chez Jeremy Bentham', *Revue d'études benthamiennes* [e-journal], 3 (2007), available online at <http://etudes-benthamiennes.revues.org/157> [accessed 14 January 2012]; P. Schofield, *Utility and Democracy. The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2009); Rosen, *Jeremy Bentham and Representative Democracy*; Steintrager, *Bentham*; Dinwiddy, *Bentham*; H. L. A. Hart, *Bentham* (Proceedings of the British Academy, London: Oxford University Press, 1962), vol. 48; Harrison, *Bentham*.
29. For the theoretical foundations of the theory of separation of powers, see C. de Montesquieu, *The Spirit of Laws* (Chicago, IL: Encyclopaedia Brittanica, 1952), pp. 70–84. For implementation at the time of Bentham, see the American Constitution (1789), whose first three articles deal with the executive, legislative and judicial powers respectively. The term 'counterforce', which is found in Bentham, finds an echo in the system of checks and balances implemented in the former thirteen Anglo-American colonies. For other occurrences of the term 'counterforce, see, among many other references Bentham, 'Economy as Applied to Office', p. 28; the term 'check' is also used, see for example Bentham, *Securities Against Misrule*, p. 45. At the time of the American Revolution, John Lind, with the help of Bentham, wrote on the guiding principles of the revolution, mainly criticizing the rights-based approach (See J. Lind, *Remarks on the Principal Acts of the Thirteenth Parliament of Great Britain. By the Author of Letters concerning the Present State of Poland ... Vol. I. Containing Remarks on the Acts relating to the Colonies. With a Plan of Reconciliation* (London, 1775); and comments in Hart, *Essays on Bentham*, p. 55). In his later writings, Bentham praises many aspects of the American republic as a model (or, the Anglo-American system, as he calls it). See for example Bentham, *Securities Against Misrule*, p. 88.
30. This mechanism is called 'deputation' (see J. Bentham, 'Constitutional Code Rationale', in *First Principles Preparatory to the Constitutional Code*, pp. 227–331, on p. 239).
31. Bentham, 'Economy as Applied to Office', p. 6.
32. Ibid., pp. 7, 32–3.

33. Active aptitude requires the functionary's physical presence in office (Bentham, 'Economy as Applied to Office', pp. 87–9). Intellectual aptitude requires a functionary to hold the appropriate knowledge for their office and to make the appropriate judgements when asked to take a decision (ibid., p. 77). Moral aptitude requires the functionary to set aside their personal interest and to look at the best interests of the people from whom they derive their power (ibid., pp. 13, 16). In his writings, Bentham opposes the moral aptitude of functionaries to what he calls sinister interest or sacrifice (see, among many references: ibid., pp. 13, 17, 28; J. Bentham, 'Identification of Interests', in *First Principles Preparatory to the Constitutional Code*, in *Collected Works*, pp. 123–47, on p. 128; Bentham, 'Constitutional Code Rationale', pp. 235, 276; Bentham, 'Observations by an Englishman', in *Securities Against Misrule*, pp. 207–56, on pp. 250–2; J. Bentham, 'Constitutional Code: Matter Occasioned by Greece', in *Securities Against Misrule*, pp. 257–76, on pp. 266–7).
34. See the Introduction to Part II, p. 50.
35. See Chapter 3, p. 62–5.
36. See Halévy, *La formation du radicalisme philosophique*, vol. 3, p. 116–8; Postema, *Bentham and the Common Law Tradition*, p. 362ff. and P. Schofield, 'Bentham on the Identification of Interests', *Utilitas*, 8:2 (1996), pp. 223–34.
37. Bentham, 'Constitutional Code Rationale', p. 232.
38. This is the definition of power, offered by Bentham. See Bentham, 'Economy as Applied to Office', p. 30.
39. See for example ibid., p. 3.
40. In nature, government acts against the general interest. See Bentham, 'Identification of Interests', p. 128.
41. Bentham talks about 'disposition' (ibid., p. 133), or 'arrangement' (Bentham, 'Economy as Applied to Office', p. 26; and Bentham, *Securities Against Misrule*, p. 25), which echoes Foucault's 'disposition'.
42. Reducing the natural opposition of interests of operative functionaries to those of the members of the community is called prevention of the sinister interest. See Bentham, 'Economy as Applied to Office', p. 28.
43. Ibid., p. 17.
44. Ibid., p. 3.
45. Ibid., p. 27.
46. Ibid., p. 13; and Bentham, 'Constitutional Code Rationale', pp. 235, 243.
47. See Chapter 2, p. 39; and Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 175, which lists the full properties of punishment.
48. Bentham, 'Economy as Applied to Office', p. 23.
49. Ibid., p. 25.
50. An explanation of the meaning of the concept of misrule can be found in J. Bentham, 'Securities Against Misrule', in *Securities Against Misrule*, pp. 23–111, on p. 23–4, where Bentham explains why the concept of 'securities against misrule' is to be preferred to expressing the same idea with a rights-based terminology. For more on the issue of fictions, see the Epilogue, pp. 127–31. Misrule is synonymous with 'bad rule', and opposed to 'good rule', which Bentham defines in 'Constitutional Code Rationale', pp. 244, 247–52.
51. Bentham, 'Economy as Applied to Office', p. 28. Bentham also builds within his system many other direct constitutional safeguards, such as that geographical divisions of constituencies elect a single representative, morally responsible to his/her electors, and that members of Parliament sit in one chamber and are elected for a year, etc.
52. Ibid., pp. 30–1.

53. For references to the POT in *An Introduction to the Principles of Morals and Legislation*, see p. 35, n.b; p. 164; p. 171, n.o; pp. 182–4.
54. Bentham, 'Constitutional Code Rationale', p. 283.
55. For a discussion on Bentham's fictions, see the Epilogue, pp. 127–30. Bentham defines a fiction in his legal writings. See also Bentham, 'Constitutional Code Rationale', p. 267.
56. Bentham, 'Constitutional Code Rationale', p. 291.
57. On Bentham's arguments against factitious honours in the shape of titles and annuities, see Bentham, 'Constitutional Code Rationale', pp. 299–305. For a contemporary discussion on honours, see Beccaria's chapter 9 entitled 'Of Honours' in *On Crimes and Punishments*. See also P. Audegean, *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir punir* (Paris: Vrin, 2010).
58. Bentham, *Securities Against Misrule*, pp. 60–1. See also Bentham, 'Constitutional Code Rationale', p. 289, where Bentham makes a convincing claim against using the tort of defamation to limit the operations of the POT. Differences between the POT, also known as the Supreme Unofficial, and the workings of a tribunal are dealt with in Bentham, *Securities Against Misrule*, pp. 64–73. The main difference between the POT and an official judicatory lies in the distance which separates members of the POT, and the internal division between the aristocratical branch and the democratical.
59. Bentham, 'Economy as Applied to Office', p. 29.
60. For a discussion of the role of women in Bentham's philosophy, see Campos-Boralevi, *Bentham and the Oppressed*; and more recently Sokol, *Bentham, Law and Marriage*. Bentham clearly includes women in the universal suffrage. See Bentham, *Securities Against Misrule*, p. 58. See also J. Bentham, *Rights, Representation and Reform: Writings on the French Revolution*, in *The Collected Works of Jeremy Bentham*, ed. P. Schofield, C. Pease-Watkin, and C. Blamires (Oxford: Oxford University Press, 2002), pp. 69–70.
61. Bentham, 'Securities Against Misrule', p. 57.
62. Ibid., p. 28. This statement is also found in Bentham, 'Economy as Applied to Office', p. 57.
63. This would indeed be consistent with Bentham's own experience of contributing to the debate on social reform in countries others than his own. See Bentham's writings for France, at the time of the French Revolution, in *Rights, Representation, and Reform*; and titles which speak for themselves, such as: Bentham, *Legislator of the World*. In all these instances, Bentham did feel that he was contributing to the public debate and the prevention of misrule in foreign countries; as such, he would have been part of the POT of the said country.
64. Bentham, 'Economy as Applied to Office', pp. 57–8.
65. Bentham, 'Constitutional Code Rationale', p. 276.
66. Bentham, 'Economy as Applied to Office', p. 68.
67. Ibid., p. 69.
68. Ibid., pp. 36–7, 121.
69. The term 'shares' is used by Bentham in 'Constitutional Code Rationale', p. 238.
70. Bentham, 'Identification of Interests', p. 133; Bentham, 'Securities Against Misrule', p. 56.
71. In Jürgen Habermas's interpretation of Bentham, a decision conforms to the general interest if it is a majority decision. See J. Habermas, *L'espace public*, 17th edn (1961; Paris: Payot, 2010), p. 148.
72. In *Political Tactics*, Bentham makes provisions for three types of votes in the Assembly: ayes, noes and neuters. See Bentham, *Politcal Tactics*, p. 153. However, except in a refer-

endum or in a vote on a bill, functionaries and constituents are not asked to decide along these lines, but to devise a system which will make it possible to reach a given outcome.

73. Contrary to what Marx thought, Bentham might not be the herald of bourgeois ideology he thought him to be. See K. Marx, *Le capital*, 3 vols (Paris: Editions sociales, 1976), vol. 1, p 675, n. 58.
74. Bentham, 'Economy as Applied to Office', p. 69.
75. Bentham, *Legislator of the World*, p. 285, n.a.
76. Bentham's categories are vague. Indeed, how is it possible to distinguish the literary aristocracy from the editor of a newspaper or the essay-writer, who compose outstanding members of the POT, when not called upon to become presidents of its committees?
77. Bentham, 'Economy as Applied to Office', p. 70. See also Bentham, 'Securities Against Misrule', p. 67, where Bentham uses the phrase 'two intestine sets of enemies' to describe the relation between the Democratical and the Aristocratical sections of the POT.
78. Bentham, 'Economy as Applied to Office', pp. 69, 71.
79. Bentham observed that the poor man, as well as the rich one, was able to identify his own interest: '[he] knows what is his interest as well as they do' (J. Bentham, *A Defence of Usury*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, pp. 1–29, on p. 7, quoted in Quinn, 'The Fallacy of Non-Intereference', p. 3).
80. Rosen, *Jeremy Bentham and Representative Democracy*, p. 39.
81. Ibid.
82. Bentham, 'Securities Against Misrule', pp. 25–8.
83. See for example J. Starobinski, *Jean-Jacques Rousseau, Transparency and Obstruction*, trans. A. Goldhammer (Chicago, IL: Chicago University Press, 1988).
84. M. Bozzo-Rey, 'La transparence chez Jeremy Bentham: de l'invisibilité d'un concept à sa publicité', in A. Brunon-Ernst (ed.), *Tocqueville Review/La revue Tocqueville*, 32:1, Jeremy Bentham's Theory Today (2011), pp. 89–112.
85. Foucault, *Discipline and Punish*, pp. 195–228.
86. Habermas, *L'Espace public*, p. 110.
87. Laval, 'Ce que Foucault a appris de Bentham'.
88. See the disposition of members in the assembly so that they can easily read the synoptic tables for amendments in Bentham, *Political Tactics*, p. 116.
89. Bentham, 'Economy as Applied to Office', pp. 69, 57; Bentham, 'Securities Against Misrule', p. 28.
90. Bentham, 'Constitutional Code Rationale', p. 259. See also Bentham, 'Economy as Applied to Office', p. 66, where the metaphor of the jury is used.
91. Bentham, 'Securities Against Misrule', p. 58.
92. Bentham, 'Economy as Applied to Office', p. 64.
93. Bentham, 'Securities Against Misrule', p. 59.
94. Bentham, *Political Tactics*, p. 35.
95. Bentham, 'Identification of Interests', pp. 144–5.
96. Bentham, 'Securities Against Misrule', p. 59.
97. Ibid., p. 63.
98. Ibid.
99. Ibid., pp. 59–60.
100. Bentham, 'Economy as Applied to Office', p. 68.
101. Habermas recognizes that Bentham's POT (which he characterizes as publicity acting as a tribunal) can err, but is incorruptible. See Habermas, *L'espace public*, p. 110.

102. Bentham, 'Economy as Applied to Office', p. 57. Bentham considers that the Aristocratical section is erring in its decision at all times (see ibid., p. 76).
103. Bentham, 'Constitutional Code Rationale', p. 241.
104. Bentham, 'Securities Against Misrule', p. 48.
105. The interrelations between Bentham and Adam Smith are clearly identified in the field of politics. See Habermas, *L'espace public*, pp. 95–6.
106. Bentham, 'Securities Against Misrule', pp. 46–50.
107. On Habermas, see B. Frydman, 'Habermas et la société civile contemporaine', in B. Frydman (ed.), *La société civile et ses droits* (Brussels: Bruylant, 2004), pp. 123–44. On the Foucault/Habermas debate, see J. Habermas, 'Some Questions Concerning the Theory of Power: Foucault Again', in M. Kelly (ed), *Critique and Power. Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1994), pp. 79–104.
108. Habermas read the different versions of *Political Tactics*, as published by Dumont and Bowring (Habermas, *L'espace public*, p. 278n.). See also p. 109.
109. J. Habermas, 'The Public Sphere: An Encyclopedia Article (1964)', trans. S. Lennox and F. Lennox, *New German Critique*, 3 (1974), pp. 49–55.
110. Ibid., p. 49.
111. Ibid., pp. 52–3.
112. Foucault would not have disclaimed the comparison. He writes in 'The Ethics of the Concern for Self as a Practice of Freedom', p. 28: 'I am quite interested in [Habermas's] work, although I know he completely disagrees with my views. While I, for my part, tend to be a little more in agreement with what he says [...]' .
113. Habermas, 'The Public Sphere', p. 51.
114. Ibid., p. 52.
115. Ibid.
116. Ibid., p. 49.
117. Ibid., p. 53.
118. Foucault, 'The Ethics of the Concern for Self as a Practice of Freedom', p. 298.
119. Ibid.
120. Ibid.
121. See Chapter 1, p. 13; and Chapter 2, p. 43.
122. Bentham, 'Securities Against Misrule', p. 71.
123. Bentham, *Political Tactics*, p. 122. In Bentham, 'Constitutional Code Rationale', p. 261, Bentham opposes two different types of arguments: those which apply to the will (for example in cases of corruption) and those which apply to the understanding (in the shape of delusion). It is the latter Bentham wishes to fight though deliberative discipline. The press too can fall prey to far more subtle censorship than 'blocking', through the operation of delusion, which operate through the misuse of fictitious language. See ibid., p. 293.
124. Ibid., p. 131.
125. Ibid., p. 116. The content of the rules is of course typified, as are the language used, the number of words etc. See ibid., pp. 121, 139.
126. Ibid., p. 47.
127. Ibid., pp. 94, 101.
128. As the undue influence exercised by the oligarchy. See Bentham, *Political Tactics*, p. 109.
129. Ibid., p. 127.
130. Ibid., p. 130.
131. 'La mise en jeu des relations de pouvoirs n'est évidemment pas plus exclusive de l'usage de la violence que de l'acquisition des consentements' in Foucault, 'Le sujet et le pouvoir', p. 236.

132. Bentham, *Political Tactics*, p. 146.
133. See Chapter 3, pp. 52–8.
134. Foucault, 'Le sujet et le pouvoir', p. 237 (my translation).
135. On the panoptic features of Bentham's parliamentary proceedings, see P. Niesen, 'Die Macht Der Publizität. Jeremy Benthams Panoptismen', in R. Krause and M. Rölli (eds) *Macht. Begriff und Wirkung in der politischen Philosophie der Gegenwart* (Bielefeld: Verlag, 2008).
136. Laval, 'Ce que Foucault a appris de Bentham', p. 30.
137. See Bentham, *Of the Limits*, p. 24, and Chapter 4, p. 51.

Part III: The Biopolitical Expert

Introduction: The Moralist and the Economist

1. Rosen, *Jeremy Bentham and Representative Democracy*, p. 207. See also D. Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989), p. 279.
2. Bentham, *Constitutional Code for the Use of All Nations*, ch. 7, p. 119.
3. Schofield reads the principle of utility as both a theory of motivation and a theory of ethics (Schofield, 'Jeremy Bentham: Legal Philosopher and Political Reformer', p. 2).
4. James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), p. 17.
5. No matter how noble or mean it might appear at first glance (Baumgardt, *Bentham and the Ethics of Today,* p. 377).
6. Dube, *The Theme of Acquisitiveness*, p. 87.
7. Ibid., p. 88.
8. Bentham, *A Table of the Springs of Action*, in *Deontology, Together with* A *Table of the Springs of Action*, p. 31.
9. Steintrager, *Bentham*, p. 29.
10. Kelly, *Utilitarianism and Distributive Justice,* p. 50.
11. Ibid., p. 53.
12. On acquisition and transfer of knowledge, see K. A. Ericsson, M. J. Prietula, E. T. Cokely, 'The Making of an Expert', *Harvard Business Review* (3 October 2011), available online at <http://hbr.org/2007/07/the-making-of-an-expert/ar/1>.
13. I. Nonaka, and T. Nishiguchi (eds), *Knowledge Emergence: Social, Technical, and Evolutionary Dimensions of Knowledge Creation* (New York: Oxford University Press, 2001), p. 4.
14. Ibid., p. 5.
15. L. Sjöberg, 'Limits of Knowledge and the Limited Importance of Trust', *Risk Analysis*, 21:1 (2001), pp. 189–98.
16. S. Jasanoff (ed.), *States of Knowledge: The Co-Production of Science and Social Order* (London: Routledge, 2004), pp. 13–45.
17. H. M. Collins and R. Evans, 'The Third Wave of Science Studies: Studies of Expertise and Experience', *Social Studies of Science*, 32:2 (2002), pp. 235–96.
18. H. M. Collins and R. Evans, *Rethinking Expertise* (Chicago, IL: University of Chicago Press, 2007), p. 2.
19. Ibid., pp. 3–4.
20. See Ibid.

21. See M. Lynch's Review of Collins and Evans's *Rethinking Expertise*: M. Lynch, 'Know-How', *American Scientist*, July–August 2008, available online at http://www.americanscientist.org.bookshelf/pub/know-how [accessed 1 February 2012].
22. See Bentham, *Of the Limits*, pp. 232–3; and M. Bozzo-Rey, 'Publicity and Nomography: Bentham's School of Legislation', *Journal of Bentham Studies*, 12 (2010), available online at <www.ucl.ac.uk/Bentham-Project/>.
23. Quited in Rose, *Powers of Freedom*, p. 278.

5 Are there Biopolitical Ethics?

1. M. Foucault, *Fearless Speech*, ed. J. Pearson (Los Angeles, CA: Semiotext(e), 2001), p. 24.
2. Bentham, *Of the Limits*, p. 4.
3. Bentham, *An Introduction to the Principles of Morals and Legislation*, p. 11.
4. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 150.
5. See G. E. Moore, *Syllabus of a Course of Ten Lectures on the Elements of Ethics* (1898; Philadelphia, PA: Temple University Press, 2004), p. 18, Kelly, *Utilitarianism and Distributive Justice*, p. 45. The same comment was made by Bonner in *Economic Efficiency and Social Justice*, p. 6.
6. Bentham, *A Table of the Springs of Action*, in *Denotology, Together with A Table of the Springs of Action*, p. 87.
7. The difference between the two terms is explored in Bowring's edition of Bentham's *Essay on Logic* (in *The Works of Jeremy Bentham*, ed. Bowring, vol. 8, pp. 285ff) and 'Appendix A' (in Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, pp. 331ff). Foucault gives the term 'deontology' a more limited meaning in *The History of Sexuality*, vol. 2, p. 37.
8. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, pp. 124–5.
9. See Bentham's comment: 'Private ethics teaches how each man may dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer themselves: the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is most conductive to the happiness of the whole community, by means of motives to be applied by the legislator' (Bentham, *Of the Limits*, p. 15).
10. J. Bentham, *Chrestomathia*, in *The Collected Works of Jeremy Bentham*, ed. M. J. Smith and W. H. Burston (Oxford: Clarendon Press, 1993), p. 202.
11. Steintrager, *Bentham*, p. 37; Kelly, *Utilitarianism and Distributive Justice*, p. 49; Dinwiddy, *Bentham*, p. 21.
12. Steintrager, *Bentham*, p. 38. See also the quote in the Introduction to Part I, pp. 7–9.
13. Kelly, *Utilitarianism and Distributive Justice*, p. 48; James (ed.), *Northern Ireland Legal Quarterly*, 24:3, Bentham and Legal Theory (1973), p. 10; Harrison, *Bentham*, p. 142, Dinwiddy, *Bentham*, p. 20–1. See also Introduction, to Part I, pp. 7, 9.
14. Bentham, *Of the Limits*, p. 6.
15. 'By Deontology, taken in its largest sense, is meant that branch of art and science which has for its object the doing on each occasion what is right and proper to be done. In its ordinary acceptation however, the use of it was confined to that part of the field of thought and action which is considered as forming the subject matter of Government and Morality. For distinction sake, in so far as it takes for its subject matter that part of

the field to which Government applies itself, Public Deontology is the name that may be employed: in so far as the application of it is considered as confined to those parts of the field of thought and action which Government has left free, Private Deontology is the name that may be employed. By Private Deontology considered as an art, understand the art of maximizing the net amount of happiness in that part of the field of thought and action which is left free by the power of law and government.' (Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 249)

16. Ibid., p. 121.
17. Bentham, *Of the Limits*, p. 3.
18. Ibid., p. 6.
19. Ibid., p. 7.
20. Bentham, *An Introduction to the Principles of Morals and Legislation*, ch. 13, pp. 158–64; and ch. 17, p. 293.
21. See among others C. Beccaria, *On Crimes and Punishments*, ed. and trans. H. Paolucci (Indianapolis, IN: Bobbs-Merrill, 1963), p. 99: 'In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws'.
22. For a discussion on sexual offences, see Chapter 1, p. 11.
23. See Quinn, 'The Fallacy of Non-Interference', p. 3.
24. Bentham, *Of the Limits*, p. 7.
25. Ibid., p. 14.
26. See Chapter 6, pp. 113–20.
27. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 150.
28. Bentham, *An Introduction to the Principles of Morals and Legislation*, pp. 17–33.
29. Ibid., p. 19.
30. Postema, *Bentham and the Common Law Tradition,* p. 150.
31. UC MS, box 70(a), ff. 17–8.
32. Dube, *The Theme of Aquisitiveness*, p. 76.
33. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 122.
34. Ibid., p. 123.
35. Ibid., p. 150.
36. Ibid., p. 251.
37. Ibid., p. 193; and see also pp. 196–7: 'The office and use of the extra-regarding branch of deontology – meaning private deontology – is to engage men in the practice of probity and beneficence by shewing, as far as this is the case, the coincidence of the dictates of probity and beneficence with those of self-regarding prudence'.
38. Ibid., p. 251.
39. Ibid., pp. 251–2.
40. Ibid., p. 122.
41. Ibid., p. 252.
42. Foucault, *Fearless Speech*, p. 135.
43. In volume three of *The History of Sexuality*, Foucault centres not on the *parrhesiastes*, but on the care of self (*heautou epimeleisthai*). See Foucault, *The History of Sexuality*, vol. 3, p. 43.
44. 'The last time we met we analyzed some texts from Plato's *Laches* where we saw the emergence, with Socrates, of a new "philosophical" *parrhesia* very different from the previous forms we examined' (Foucault, *Fearless Speech*, p. 106).

45. Ibid., p. 14.
46. Ibid., p. 18.
47. Ibid., p. 14.
48. Ibid., p. 16.
49. Ibid., p. 96.
50. Ibid., p. 16.
51. Ibid.
52. Ibid., p. 32.
53. Ibid., pp. 32–3.
54. Ibid., p. 18.
55. Ibid., p. 31.
56. Ibid., p. 67.
57. See Bentham's distinction bteween public and private deontology: 'ART. 32. As to the two corresponding Codes of good manners here spoken of, neither of them can be inserted here. Reasons are as follows – 1. For any such minute details, the Constitutional Code is not, it should seem, the proper place. 2. Scarcely is the art-and-science sufficiently in advance for the exhibition of them. 3. To a more or less considerable extent, variations would be indicated, by the diversity of sentiments, manners, and customs, in different regions and communities. 4. As the public mind [matures] itself, the matter of private, will be removed into the field of political, deontology' (Bentham, *Constitutional Code for the Use of All Nations*, p. 400).
58. Foucault, *Fearless Speech*, p. 14.
59. Ibid., p. 66.
60. Ibid., p. 83.
61. Ibid., p. 141.
62. Ibid., p. 106.
63. Ibid. See also M. Foucault, 'Polemics, Politics, and Problematizations: An Interview with Michel Foucault' (1984), in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 111–9, on p. 112: 'a whole morality is at stake, the morality that concerns the search for the truth and the relation to the other'.
64. Foucault, *Fearless Speech*, p. 107.
65. Ibid., p. 136.
66. Ibid., p. 85. On the issue of truth, see also Foucault, *The History of Sexuality*, vol. 3, p. 68.
67. 'I do not think one can find any normalization in, for instance, the Stoic ethics' (M. Foucault, 'On the Genealogy of Ethics' (1983), in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 253–80, on p. 254.
68. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 254.
69. Ibid., p. 254.
70. Ibid., p. 251; Foucault, *Fearless Speech*, p. 18.
71. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 254.
72. Foucault, *Fearless Speech*, p. 14.
73. Ibid., p. 21.
74. Ibid.
75. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 256.
76. Foucault, *Fearless Speech*, p. 138.
77. Ibid., p. 16.
78. Bentham, *Deontology*, in *Denotology, Together with A Table of the Springs of Action*, p. 265.
79. Foucault, *Fearless Speech*, p. 16.

80. Ibid., p. 279.
81. Ibid., p. 13.
82. M. Foucault, 'Subjectivity and Truth' (1984), in *Ethics*, ed. Rabinow, trans. Hurley et al., vol. 1, pp. 87–92, on p. 89. The concept is also developed in vols 2 and 3 of Foucault, *The History of Sexuality* and in *Fearless Speech*, p. 24.
83. Foucault, *Fearless Speech*, p. 111.
84. Ibid., p. 164.
85. Ibid., p. 160.
86. Ibid., p. 165.
87. Ibid.
88. Ibid., p. 166.
89. Ibid., p. 165.
90. Ibid., p. 111.
91. See also Foucault, *The History of Sexuality*, vol. 2, pp. 27–8.
92. See Brunon-Ernst (ed.), *Beyond Foucault*; and Brunon-Ernst (ed.), *Revue d'études benthamiennes*, 8, Foucault et l'utilitarianisme (2011).
93. Foucault opposes disciplines and techniques of the self. He writes: 'What we call "disciplines" is something really important in this kind of institution; but it is only one aspect of the art of governing people in our societies ... I would like in the years to come, to study the power relations starting from the techniques of the self'. This work shows that there is no need to distinguish disciplines from techniques of the self, as they both aim at governing the conduct of conduct (Foucault, 'Sexuality and Solitude', p. 177).
94. See Chapter 1 in Brunon-Ernst (ed.), *Beyond Foucault*, pp. 17–41. See also Brunon-Ernst, *Le Panoptique des pauvres*.
95. Both forms of surveillance use the gaze and the written medium to control individuals. This use of writing as a means to ensure self-discipline is developed in Foucault: 'In the case of the epistolary account of oneself, it is a matter of bringing into congruence the gaze of the other and the gaze which one aims at oneself when one measures one's everyday actions according to the rules of a technique of living' (M. Foucault, 'Self-Writing', in *Ethics*, ed. Rabinow, trans. Hurley et al., pp. 201–22, on p. 221). This interpretation is justified by Foucault's comment that: '[f]rom the eighteenth century to the present, the techniques of verbalization have been reinserted in a different context by the so-called human sciences in order to use them without renunciation of the self but to constitute, positively, a new self' (p. 225).
96. Foucault call governmentality the meeting ground between the technologies aiming to control oneself and to control others: 'This encounter between the technologies of domination of others and those of the self, I call "governmentality"' (Foucault, 'Technologies of the Self', p. 225).
97. This is echoed in Foucault's statement: 'It is what one could call an ascetic practice ... as an exercise of the self on the self by which one attempts to develop and transform oneself, and to attain to a certain mode of being' (Foucault, 'The Ethics of the Concern for the Self as a Practice of Freedom', p. 282).
98. See more particularly, Bentham, *Constitutional Code for the Use of All Nations*.
99. See also Foucault, *The History of Sexuality*, vol. 3, p. 89.
100. Bentham, *Of the Limits*, p. 232.
101. Bentham, *Chrestomathia*, p. 32–4. See also Foucault's comments on the function of the individual who teaches the care of the self: 'these different functions of professor, guide, adviser, and personal confidant were not always distinct – far from it: in the practice of

the cultivation of self, the roles were often interchangeable' (Foucault, *The History of Sexuality*, vol. 3, p. 52).

102. Bentham, *Chrestomathia*, p. 28.
103. Brunon-Ernst, *Le Panoptique des pauvres*, pp. 172–4.
104. Plato, *The Republic*, trans. Jowett (New York: Vintage Books, 1991), bk 6.
105. T. Osborne made this argument in a number of papers: 'Liberalism, Neo-liberalism and the Liberal Profession of Medicine', *Economy and Society*, 22:3 (1994), pp. 345–56; T. Osborne, 'Bureaucracy as a Vocation: Governmentality and Administration in Nineteenth-Century Britain', *Journal of Historical Sociology*, 7:3 (1996), pp. 289–313; T. Osborne, *Aspects of Enlightenment: Social Theory and the Ethics of Truth* (London: UCL, 1998).
106. See Chapter 3, p. 57.
107. Rose, *Powers of Freedom*.
108. C. Taylor, 'Foucault and the Ethics of Eating', *Foucault Studies*, 9 (2010), pp. 71–88, on pp. 72–3. See also Bentham's definition of deontology in Chapter 5, p. 92, as compared to Foucault's statement: 'If you mean by ethics a code that would tell us how to act, then of course *The History of Sexuality* is not an ethics. But if by ethics you mean the relationship you have to yourself when you act, then I would say that it intends to be an ethics' (M. Foucault, 'An Interview by Stephen Riggins' (1982), in *Ethics*, ed. Rabinow, trans. Hurley, vol. 1, pp. 121–33, on p. 131). Bentham and Foucault share a common understanding of ethics as a relationship to conduct.
109. J. Bentham, 'Letter to Dumont, 29th Nov 1821', in *The Correspondence of Jeremy Bentham. Volume 10: July 1820 to December 1821*, in *The Collected Works of Jeremy Bentham*, ed. S. Conway (Oxford: Clarendon Press, 1994), p. 443.

6 Political Economy as The Republic of Interests

1. Foucault, *The Birth of Biopolitics*, p. 46. The reference to all the Bentham economics manuscript sources were given by Dr Michael Quinn (Bentham Project, UCL), currently editing the three volumes of the *Economics Writings* in the *Collected Works*. I am thankful for his support, which helped to produce an updated study of Bentham's economic thought.
2. Bentham manuscript in Dumont papers, box 51, f. 293.
3. Foucault, *The Birth of Biopolitics*, p. 65.
4. See also T. Osborne, 'Security and Vitality: Drains, Liberalism and Power in the Nineteenth Century', in Barry, Osborne and Rose (eds), *Foucault and Political Reason*, pp. 99–121, on pp. 101, 115.
5. Foucault, *The Birth of Biopolitics*, p. 41.
6. See more particularly N. Sigot, *Bentham et l'économie*: *Une histoire d'utilité* (Paris: Economica, 2001); N. Sigot, '"Be Quiet"', mais modérément: le role de l'Etat dans la pensée économique de Bentham', *Revue Economique*, 44:1 (1993), pp. 23–49; N. Sigot, 'L'utilitarisme benthamien à la rencontre de l'économie classique' (PhD disseration, Panthéon-Sorbonne University, 1995); N. Sigot, 'Les principes d'un système monétaire sain selon Bentham', *Cahiers d'Economie Politique*, 32 (1998), pp. 117–40; N. Sigot, 'Art et science chez Bentham', *Information sur les sciences sociales/Social Science Information*, 38:4 (1999), pp. 575–89; A. L. Cot, 'Jeremy Bentham, un "Newton de la morale"', in A. Béraud and G. Faccarello (eds), *Nouvelle histoire de la pensée économique* (Paris: La Découverte, 1992), pp. 289–301; A. L. Cot, 'Entre expertise et utopie: Bentham et la question des colonies', in Brunon-Ernst (ed.), *Tocqueville Review/La revue Tocqueville*, 32 :1, Jeremy Bentham's Theory Today (2011), pp. 67–88; M. E. L. Guidi, 'Le citoyen

Bentham, "raisonnable censeur des lois" et l'économie de la Révolution française', in G. Faccarello and P. Steiner (eds), *La pensée économique pendant la Révolution française* (Grenoble: Presses Universitaires de Grenoble, 1990), pp. 487–504; M. E. L. Guidi, 'L'utilitarisme et les origines du savoir économique: la thèse de la douleur de Locke à Bentham', *Oeconomia*, 18 (1993), pp. 33–65; M. E. L. Guidi, 'Is There a Political Economy of Legal Procedure in Bentham's Thought', presented at the New Directions in Bentham Studies conference, Bentham House, UCL, London, 9 December 2011; Laval, *Jeremy Bentham, les artifices du capitalisme*.

7. Foucault, *The Birth of Biopolitics*, p. 70.
8. See Marx, *Le capital*, vol. 1; J. A. Schumpeter, *Esquisse d'une histoire de la Science économique des origines au début du XXe siècle* (1914; Paris: Dalloz, 1962); J. A. Schumpeter, *Théorie de l'évolution économique* (1935; Paris: Dalloz, 1999); J. A. Schumpeter, *Histoire de l'analyse économique*, 3 vols (1954; Paris: Gallimard, 1983); J. M. Keynes, *The End of Laissez-faire* (1926), in *The Collected Writings of John Maynard Keynes* (Cambridge: MacMillan, 1972).
9. See Chapter 4, p. 67–8.
10. Foucault, *The Birth of Biopolitics,* pp. 7–10.
11. Ibid.
12. Ibid., pp. 10–12.
13. Ibid., p. 13.
14. Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 33 (my translation).
15. Foucault, *The Birth of Biopolitics*, p. 13 (my emphasis).
16. See Chapter 3, p. 58–9.
17. Foucault, *The Birth of Biopolitics,* p. 40: 'The question addressed to government at every moment of its action and with regard to each of its institutions, old or new, is: Is it useful? For what is it useful? When does it become harmful? This is not the revolutionary question: What are my original rights and how can I assert them against any sovereign? But it is the radical question, the question of English radicalism; the problem of English radicalism is the problem of utility. Don't think that English political radicalism is no more than the projection of an utilitarian ideology on the level of politics. It is, rather, an attempt to define the sphere of competence of government in terms of utility on the basis of an internal elaboration of governmental practice.'
18. Ibid., p. 41.
19. Ibid., p. 2.
20. Ibid., p. 41.
21. See C. Laval, 'La chaîne invisible', *Revue d'études benthamiennes* [e-journal], 1 (2006), available online at <http://etudes-benthamiennes.revues.org/63> [accessed 15 January 2012].
22. See for example: 'The clauses of this contract are so determined by the nature of the act that the slightest modification would make them vain and ineffective; so that, although they have perhaps never been formally set forth, they are everywhere the same and everywhere tacitly admitted and recognized, until, on the violation of the social compact, each regains his original rights and resumes his natural liberty, while losing the conventional liberty in favour of which he renounced it. These clauses, properly understood, may be reduced to one – the total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others. Moreover, the alienation being without reserve, the union is as perfect as it can be, and no associate has anything more to demand: for, if the individuals retained certain

rights, as there would be no common superior to decide between them and the public, each, being on one point his own judge, would ask to be so on all; the state of nature would thus continue, and the association would necessarily become inoperative or tyrannical. Finally, each man, in giving himself to all, gives himself to nobody; and as there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has' (Rousseau, *The Social Contract and Discourses*, trans. Cole, p. 14).

23. Foucault, *The Birth of Biopolitics*, p. 39.
24. Ibid., p. 40.
25. Ibid.
26. Ibid., p. 43, n. (p. 18a of Foucault's deleted notes).
27. Ibid., p. 70.
28. Ibid., p. 47.
29. Ibid., pp. 20–1n. Foucault offers another definition at p. 61: 'So, I have tried to indicate three features: veridiction of the market, limitation by the calculation of governmental utility, and now the position of Europe as a region of unlimited economic development in relation to a world market. This is what I called liberalism.'
30. See for example Max Lerner's definition of liberalism in *The Encyclopaedia Britannica*: 'Liberalism is the creed, philosophy and movement which is committed to freedom as a method and policy in government, as an organizing principle in society and as a way of life for the individual and community' (M. Lerner, 'Liberalism', in *Encyclopaedia Britannica*, 14th edn (Chicago, IL: Benton, 1960–73), p. 462).
31. Foucault, *The Birth of Biopolitics*, p. 17.
32. Ibid., p. 14.
33. Ibid., p. 15.
34. Ibid., p. 16.
35. Ibid.
36. Ibid., p. 17.
37. Ibid., p. 19, and see also the study of the relationship between power and knowledge in Foucault's works: M. Foucault, *Madness and Civilization* (1967; London: Routledge, 2007); Foucault, *The Birth of the Clinic*; Foucault, *Discipline and Punish*; Foucault, *The History of Sexuality*, vol. 1.
38. Foucault, *The Birth of Biopolitics,* p. 30.
39. Ibid., pp. 30–1.
40. Ibid., p. 31.
41. Ibid., pp. 31–2.
42. Ibid., p. 32.
43. Ibid., p. 28.
44. For a discussion on the liberal individual, see A. Pizzorno, 'Foucault et la conception libérale de l'individu', in *Michel Foucault philosophe. Rencontre internationale Paris 9, 10, 11 janvier 1988* (Paris: Seuil, 1989).
45. Ibid., p. 29.
46. See Brunon-Ernst, 'Le vocabulaire benthamien', pp. 95–118.
47. Foucault, *The Birth of Biopolitics*, p. 28.
48. Ibid., p. 69.
49. Ibid., p. 37.
50. Ibid., p. 38. On the same page, Foucault aptly notes that Bentham was a public law theorist as well as an economist.

51. Ibid., p. 39.
52. See above, p. 109.
53. Foucault, *The Birth of Biopolitics*, p. 40. For a definition of *agenda/non-agenda*, see above, pp. 110–2.
54. Foucault, *The Birth of Biopolitics*, p. 12.
55. Ibid.
56. Ibid., p. 47.
57. Ibid., p. 40.
58. See above, pp. 110–2.
59. Foucault, *The Birth of Biopolitics*, p. 44.
60. Ibid.
61. Ibid.
62. Ibid., p. 45.
63. Ibid., p. 44.
64. Ibid., pp. 65–7.
65. Ibid., p. 68.
66. Ibid., pp. 66–7.
67. For a detailed study of the Panopticon, see Brunon-Ernst (ed.), *Beyond Foucault*, especially the introduction, pp. 1–15, and chapter 1, pp. 17–40.
68. Foucault, *The Birth of Biopolitics,* p. 67.
69. Ibid., p. 41.
70. Ibid., p. 29. In Bentham, see the use of the term frugal in his economic writings: UC MS, box 17, f. 156; UC MS, box 17, f. 255; UC MS, box 17, f. 007r1; UC MS, box 25, f. 36; UC MS, box 166, f. 40. For comments on the term, see Sigot, *Bentham et l'économie*, p. 102.
71. See Sigot, *Bentham et l'économie*, p. 90; Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 8, Halévy, *La formation du radicalisme philosophique*, vol. 1, pp. 112, 139. There are two schools of interpretation on the status of Bentham's economic thought: the first states that Bentham is a liberal economist (see Halévy, *La formation du radicalisme philosophique*, vol. 1, pp. 112, 139; Schumpeter, *Histoire de l'analyse économique*, vol. 2, pp. 48–50; and Keynes, *The End of Laissez-faire*, p. 279); the second challenges this received interpretation (see the works of Guidi, Sigot and Laval).
72. J. A. Schumpeter, *History of Economic Analysis*, in M. Perlman (intro.) (1954; London: Routledge, 1986), p. 129: 'Bentham considered himself primarily a moralist and a legislator, and it was as a criterion of "good" or "bad" legislation that the principle of greatest happiness of the greatest number acquired for him paramount importance'.
73. See 'The two useful parts of moral philosophy, therefore, are Ethics and Jurisprudence' (A. Smith, *The Theory of Moral Sentiments*, ed. K. Haakonssen (Cambridge: Cambridge University Pree, 2002), p. 402).
74. See Stark (ed.), *Jeremy Bentham's Economic Writings*, vol. 1.
75. See Guidi, 'Is There a Political Economy of Legal Procedure in Bentham's Thought', where he examines the political economic principles applied in Bentham's non-economic writings.
76. See above, pp. 113–20. See also Schumpeter's statement that Bentham coined the phrase 'forced frugality' (Schumpeter, *History of Economic Analysis*, p. 693).
77. See Brunon-Ernst, 'Le vocabulaire benthamien', pp. 95–118.
78. UC MS, box 17, f. 187.
79. On labour as the only source of increase of wealth see UC MS, box 17, f. 231, and also 'But as neither land can be acted upon or made subservient to human use or well-being but

by labour, nor materials prepared for use, nor so much as extracted, without labour – in that respect labour may be considered the sole source of wealth – and every modification of wealth may be referred to labour as to its *efficient cause*' (UC MS, box 99, f. 186).

80. On increasing the labour force and productivity, see: 'All hands being employed, and employed in the most advantageous manner, *wealth* could admitt of no further encrease: but *money* would be encreasable *ad infinitum*' (UC MS, box 17, f. 251); see also UC MS, box 17, f. 332.
81. On savings as a source of wealth, see '1. The national wealth – the wealth of the community – is the sum of the several masses of wealth belonging to the several individuals of which that community is composed. 2. The addition made to the mass of wealth at the end of each year is the sum of the savings made by all the individuals in question in the course of the year. It is the difference between the sum of the *comings-in* and the sum of the *out-goings* in the course of the year' (UC MS, box 17, f. 144). However, Bentham concludes that it is better to increase the quantity of labour rather than to save on it, through labour cuts or machinery (UC MS, box 17, f. 233).
82. Guidi, 'Is there a Political Economy of Legal Procedure in Bentham's Thought?'
83. References to Adam Smith are common in Bentham's economic writings. See Bentham, *Jeremy Bentham's Economic Writings*, ed. Stark, vol. 1, pp. 123, 223, 303, 341, 344, 346–7, 349–50; vol. 2, pp. 125, 141, 269, 330, 337, 339, 342, 450; vol. 3, pp. 77–8, 80, 87, 93, 106, 112, 131, 134, 143, 154, 161, 182, 219, 222, 235–8, 258–9, 276, 318, 321, 331, 325, 360–1, 367. For an assessment of the influence of Smith on Bentham, see Laval, *Jeremy Bentham, les artifices du capitalisme*, pp. 13–25.
84. The focus is once again on government: 'The subject matter of the present work being – not the entire field of the art of government (including its principal branch, legislation) but only that part of it which is understood to appertain [to] that department of it which has received the name of political economy – the object consequently is – not to enquire what course it will be the properest for the sovereign to take on every occasion that presents itself to his notice, but only on such occasions as are understood to come within the field of enquiry of the branch so denominated, and within the field of action of the corresponding branch of the art of government – *the art of government in matters of political economy*'. UC MS, box 17, ff. 171–2 (my emphasis).
85. These aims appear in his legal writings throughout his life. See a 1786 manuscript: 'Quatre buts du droit distributif privé – 1. Subsistance. 2. Abondance. 3. Sûreté. 4. Egalité' (UC MS, box 99, f. 32) compared to a 1827 manuscript: 'rights are 1. of subsistence. 2. of abundance. 3. of security. 4. Of equality' (UC MS, box 30, f. 26).
86. See for example UC MS, box 17, f. 167; UC MS, box 99, f. 186 and UC MS, box 17, f. 153.
87. Bentham, *Principles of the Civil Code*, p. 302. See also in Bentham's economic writings, UC MS, box 17, f. 171, where Bentham adds two other ends – populousness and liberty, which he does not mention in other writings.
88. UC MS, box 17, f. 167.
89. Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 13.
90. Bentham does not define subsistence, since the term is self-evident. See UC MS, box 17, f. 174.
91. UC MS, box 17, f. 170: 'Subsistence can not be placed any where but at the head of the list of subordinate ends. Subsistence – actual subsistence, however, neither requires nor admitts of any axioms of the pathological kind to [constitute] the foundation of its importance. Without actual subsistence, neither suffering nor enjoyment.'

92. UC MS, box 17, f. 167.
93. UC MS, box 17, f. 167: 'What concerns him is – that the desirable effect should take place: – not that it should have his own agency for the cause. If the end could be accomplished without any interference on his part, so much the better: and so much as will take place of itself, so much he will suffer to be done. The whole course of legislation, though a necessary evil, is still an evil: the legislator can not stir, but what he does is felt in the shape of hardship and coercion somewhere. An attempt on the part of the legislator to produce by his interference an effect that will take place without it, is waste of labour on the part of the legislator: if it be attended, as is most commonly the case, with any act of coercive authority, it is a defalcation from liberty – and that, by the supposition, a useless one – on the part of the subject.'
94. For Bentham's writings on rights and obligations, see, among other sources: Bentham, *Principles of the Civil Code*, p. 301; J. Bentham, *A General View of a Complete Code of Laws*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, pp. 155–210, on p. 181; J. Bentham, 'Principes du Code Civil', in M. Bozzo-Rey, A. Brunon-Ernst and E. de Champs (eds), *Traités de législation civile et pénale*, ch. 1, pp. 162–3. For a detailed study of principles of civil law and contradictions in Bentham's project, see Brunon-Ernst, 'Délimiter la branche civile du droit', pp. 177–200.
95. UC MS, box 17, f. 167.
96. Bentham, *Principles of the Civil Code*, p. 303; see also Bentham, 'Principes du Code Civil', ch. 4, p. 168.
97. UC MS, box 17, f. 178: 'Abundance may be used with reference either to men – the possessors of the matter of wealth – or the matter of wealth itself. Abundance in respect of wealth – [or] Opulence; Abundance in respect of population – or populousness. These two branches of the common end run in direct opposition to one another. – Given the quantity of wealth, the degree of abundance is inversely as the number of the sharers'. This manuscript source explains how 'populousness', as a subsidiary aim of government, is only a branch of 'abundance'.
98. UC MS, box, 17, f. 314.
99. UC MS, box 17, f. 255: 'for all that government can do in behalf of enjoyment, otherwise than by *security*, is – to encrease the quantity of the mass of instruments of enjoyment: application of these instruments in such manner as to produce actual enjoyment, depends altogether upon the individual, and is an effect altogether out of the reach of governm[t]. Bentham writes elsewhere: 'With few exceptions, and those not very considerable ones, the attainment [of] the maximum of enjoyment will be most effectually secured by leaving each individual to pursue the attainment of his own particular maximum of enjoyment in proportion as he is in possession of the means. Inclination in this respect will not be wanting on the part of any one. Power – the species of power applicable to the case – wealth – pecuniary power – could not be given by the hand of government to one without being taken from another' (UC MS, box 17, f. 218).
100. UC MS, box 17, f. 209.
101. UC MS, box 17, f. 211.
102. For a discussion of equality in Bentham, see Laval, *Jeremy Bentham, les artifices du capitalisme*, pp. 104–21.
103. UC MS, box 17, f. 168.
104. UC MS, box 17, f. 227.
105. On security, see Sigot, *Bentham et l'économie*, p. 103.

106. See also J. Bentham, *Manual of Political Economy*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, p. 36, reproduced in *Jeremy Bentham's Economic Writings*, ed. Stark, pp. 219–73; Bentham, *Legislator of the World*, p. 200; Bentham, *Pannomial Fragments*, pp. 224, 230; Bentham, *Principles of the Civil Code*, p. 303.
107. UC MS, box 17, f. 168.
108. See Chapter 2, p. 40.
109. See Chapter 4, pp. 83–5.
110. UC MS, box 17, f. 154: 'I. Wealth. I. *Sponte Acta*. Steps taken by *individuals, of their own accord*, towards the encrease of the mass of the National Wealth. II. *Non agenda*. *Ineligible* measures, on the part of *Government*. – Almost all that have been employed or been proposed in this view. III. *Agenda*. *Eligible* measures on the part of Government. In point of effect and importance, these in comparison of *Sponte Acta* and *Non Agenda*, are very inconsiderable.' For a discussion on the concepts of *agenda, non-agenda* and *sponte acta*, see Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 41.
111. UC MS, box 17, f. 251.
112. UC MS, box 17, f. 212: 'But, for this any more than any other purposes, money is not raised but by taxes: and taxes are the produce of coercive laws applied to the most coercive purpose'.
113. See Chapter 4, pp. 83–5.
114. See also UC MS, box 17, f. 01: 'You ought not if you could. Protection of property is the first duty of the state. You have no right to take property from A. to make a present of it to B., though you were sure that B. would make an encrease by it, and A. none, much less for the vague, unfounded chance of such an encrease.'
115. In axioms of fact, Bentham notes (UC MS, box 17, f. 60): '2. Each individual has a stronger regard for his own interest than the legislature, or any person employ'd by the legislature, is likely to have. 3. – has better means of ascertaining what is most for his interest. 4. Every man naturally betakes himself to that branch of industry which appears to him to be most advantageous to him: taking into the account of advantage pecuniary profit and particular taste.' See also UC MS, box 17, f. 60: 'The interest of the community, therefore, can not be better served in any other manner than by suffering each individual to take that course in the line of industry which, in his judgem[t], is most advantageous for himself: so long as it is not productive of any unjust and positive detriment to any other individual'.
116. UC MS, box 17, f. 154.
117. UC MS, box 17, f. 217.
118. 'Inclination, power, knowledge – all concurring in the requisite degree, the effect takes place – the end in view is accomplished; any one failing, it fails of being accomplished' (UC MS, box 17, f. 208).
119. 'In a general view – of the three requisites, inclination appears least of a nature to be deficient on the part of the individual' (UC MS, box 17, f. 216). See also UC MS, box 17, f. 218; and 'To these deficient aspects, the abilities of government are happily adapted. Inclination it could not give – it has not power to give – in the great mass of cases: not by punishments, on account of the expensiveness and, in such cases, the comparative inefficacy of such means: not by reward – for want of a sufficient stock of that scarce and valuable matter which is not to be extracted but by taxes – that is by punishments' (UC MS, box 17, f. 217).
120. See UC MS, box 17, f. 268.

121. 'A particular case for the interference of government in this view, is where *inclination* and *knowledge*, both adequate to the purpose, and even *power* (so far as depends on the possession of the matter of wealth,) being preexistent on the part of individuals, nothing but an allotment of *political* power of an *appropriate* kind, requires to be supplied on the part of government. Such is the case where *corporate* powers are requisite for the management of a *common stock*: and thereby for enabling individuals, spontaneously associated for the purpose, to give a more effectual *combination* to their exertions, in the pursuit of a common end' (UC MS, box 17, f. 242).
122. UC MS, box 17, f. 269.
123. UC MS, box 17, f. 218.
124. UC MS, box 17, f. 269.
125. UC MS, box 17, f. 306v.
126. UC MS, box 17, f. 306v.
127. UC MS, box 17, f. 214.
128. UC MS, box 17, f. 306v.
129. J. Bentham, *Defence of Usury*, in *Jeremy Bentham's Economic Writings*, ed. Stark, vol. 1, pp. 121–207.
130. J. Bentham, *Defence of a Maximum*, in *Jeremy Bentham's Economic Writings*, ed. Stark, vol. 3, pp. 247–302.
131. J. Bentham, *Appendix M. A Brouillon for a Work with the Title: Defence of Lotteries*, in *Economic Writings*, in *Collected Works of Jeremy Bentham*, ed. M. Quinn, 3 vols (Oxford: Oxford University Press, forthcoming).
132. See Dumont papers, box 51, f. 60: 'L'esprit du jeu est un esprit de témérité, de prodigalité, de vertige et de haine: l'esprit qu'entretiennent les lotteries est un esprit de prudence, de prévoyance, de paix, d'économie et de calcul'.
133. See Marx, *Le capital*, vol. 1, p. 675, n.58, commented in Sigot, *Bentham et l'économie*, pp. 98, 100; and Laval, *Jeremy Bentham, les artifices du capitalisme*, pp. 8, 11.
134. UC MS, box 17, f. 212.
135. See A. Brunon-Ernst, 'L'abondance frugale: étude des propositions de J. Bentham pour réguler la pauvreté à la fin du XVIIIe siècle', in G. Girard (ed.), *Le superflu, chose très nécessaire* (Rennes: Presses Universitaires de Rennes, 2004), pp. 176–94; Brunon-Ernst, 'Le vocabulaire benthamien', pp. 95–118; and Brunon-Ernst (ed.), *Beyond Foucault,* pp. 17–40; 43–60.
136. Foucault, *The Birth of Biopolitics,* p. 30.
137. See above, pp. 119–20.
138. Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 9.
139. For a discussion on utility and liberalism from a different perspective, see also N. Luhmann, *Social Systems*, J. Bernardz and D. Baecker (trad.) (Stanford, CA: Stanford University Press, 1995), pp. 378–88, esp. p. 384. I thank Prof. G. Lewkowicz from The Université Libre de Bruxelles (ULB, Brussels) for bringing these texts to my attention. What Bentham calls 'expectations' finds an echo in Luhmann's 'present future' (pp. 378–81). For a discussion on the role of time in the Benthamic state, see Laval, *Jeremy Bentham, les artifices du capitalisme*, pp. 84–103.
140. See Laval, 'La chaîne invisible'.
141. See the debate about allowing NHS surgery diseases affecting the elderly: D. Campbell, 'NHS bans on operations gamble with patients' health, senior surgeon warns NHS ban on operations to save money is dangerous, warns president of Royal College of Surgeons', *Guardian*, Monday 17 January 2011, available online at http://www.guardian.co.uk/

society/2011/jan/17/nhs-bans-operations-surgeon-warns; see also the debate about the cost effectiveness of drugs avaiolable through the NHS, in the *Guardian*, 'Cancer drug "too expensive for NHS"', Thursday 1 February 2012, available online at <www.guardian.co.uk/society/2012/feb/02/cancer-drug-too-expensive-nhs?> [accessed 1 February 2012].

142. UC MS, box 3, f. 223.
143. UC MS, box 17, f. 287.
144. Laval, *Jeremy Bentham, les artifices du capitalisme*, p. 76; and Laval, *Bentham et le pouvoir des fictions.*
145. M. Foucault, *The Order of Things* (1966; London: Routledge, 2007), p. 221.
146. Foucault, *The Birth of Biopolitics*, p. 43, n. (p. 18a of Foucault's deleted notes).
147. Ibid., p. 22.
148. Ibid., p. 28.

Epilogue: (De)constructing Biopolitics

1. UC MS, box 17, f. 64, in the *Appendice to the Manual of Political Economy*. Many thanks to Dr Michael Quinn for the quote.
2. Foucault, *The Order of Things*, p. 323. In his statement, Foucault qualifies the use he makes of the concept of table, opposing the eighteenth-century notion of a table as a grid to that of a table freed from its classifying role, that is: what he calls a portrait.
3. Legrand*, Les normes chez Foucault,* p. 218.
4. Bentham, *A Table of the Springs of Actions*, in *Deontology, Together with A Table of the Springs of Action*, pp. 5–6.
5. Ibid., pp. 100–1.
6. See Chapter 1, p. 26; and Chapter 2, p. 33.
7. The term language in English is ambiguous, since it means both natural languages (such as French, German, English, Spanish), but also 'kinds of language' (such as sign language, the language of medicine). Both meanings are used in the present chapter. For commentaries on Bentham's Theory of Fictions and on his methodology, see: G. Michaut (ed. and trans.), 'Introduction', in J. Bentham *Théorie des Fictions* (Paris: Editions de l'Association Freudienne Internationale, 1996); Laval, *Bentham et le pouvoir des fictions*; Steintrager, *Bentham*, p. 24; Postema, *Bentham and the Common Law Tradition*, pp. 341–57, 408–22.; Dinwiddy, 'Language and Method', in *Bentham*; Harrison, *Bentham*, pp. 24–46; Dube, *The Theme of Acquisitiveness*, pp. 75–97; Long, *Bentham on Liberty*, pp. 61–3; Lyons, *In the Interest of the Governed*, pp. 89–90; M. Mack, *Jeremy Bentham. An Odyssey of Ideas, 1748–1792* (London: Heinemann, 1962), p. 21; L. J. Hume, 'The Political Functions of Bentham's Theory of Fictions ', *Bentham Newsletter*, 3 (1979), pp. 18–27; J. H. Burns, 'Bentham's Critique of Political Fallacies', in B. Parekh (ed.), *Jeremy Bentham: Ten Critical Essays* (Frank Cass: London, 1974), pp. 154–60; H. L. A. Hart, 'Bentham', in Parekh (ed.), *Jeremy Bentham*, pp. 80–9; Schofield, 'Political Fallacies', in Schofield, *Bentham. A Guide for the Perplexed*, pp. 94–115; J. Bouveresse, 'La théorie des fictions chez Bentham', in K. Mulligan and R. Roth (eds), *Recherches et Rencontres*, 4, Regards sur Bentham et l'utilitarisme (Geneva: Droz, 1993), pp. 87–98; A. Brunon-Ernst, 'Le langage sous contrainte', in *Le Panoptique des pauvres*, pp. 113–31; E. de Champs, 'The Place of Jeremy Bentham's Theory of Fictions in Eighteenth-century Linguistic Thought', *Journal of Bentham Studies*, 2 (1999), available online at <http://www.

ucl.ac.uk/Bentham-Project/journal/nldechmp.htm>; G. Tusseau, *Jeremy Bentham. La guerre des mots* (Paris: Dalloz, 2011).

8. Michael Quinn distinguishes fiction, as the malevolent or sinister use of language, from fictitious entities, which is the name of a category of linguistic entities. See M. Quinn, 'Bentham, Utility and Truth', presented at the New Directions in Bentham Studies conference, Bentham House, UCL, London, 9 December 2011.
9. Bentham, *Théorie des Fictions*, p. 38. G. Michaut's introduce and translates C. K. Ogden's editions of Bentham's writings *The Works of Jeremy Bentham*, ed. Bowring (C. K. Ogden (ed.), *Bentham's Theory of Fictions* (London: Kegan Paul, Trench, Trubner & Co., 1932)). It is a bilingual edition.
10. Bentham, *Théorie des Fictions*, p. 44 and p. 48: 'A real entity is an entity to which, on the occasion and for the purpose of discourse, existence is really meant to be ascribed. Under the head of perceptible real entities may be placed without difficulty, individual perceptions of all sorts: the impressions produced in groups by the application of sensible objects to the organs of the sense: the ideas brought to view by the recollection of those same objects; new ideas produced under the influence of the imagination, by the decomposition and recomposition of those groups: – to none of these can the character, the denomination, of real entities be refused … A fictitious entity is an entity to which, though by the grammatical forms of the discourse employed in speaking of it, existence be ascribed, yet in truth and reality existence is not meant to be ascribed.'
11. J. Bentham, *Nomography*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, pp. 231–83, on p. 241. On issues related to language, see also J. Bentham, *Anarchical Fallacies*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 2, pp. 375–534; J. Bentham, *Logical Arrangements*, in *The Works of Jeremy Bentham*, ed. Bowring, vol. 3, pp. 284–95.
12. Bentham, *Théorie des Fictions*, p. 60.
13. Ibid., p. 142.
14. Ibid., p. 196: 'By the word paraphrasis may be designated that sort of exposition which may be afforded by transmuting into a proposition, having for its subject some real entity, a proposition which has not for its subject any other than a fictitious entity'.
15. Ibid., p. 48
16. Bentham, *Principles of a Civil Code*, p. 301: 'Rights are in themselves advantages; benefits for him who enjoys them: obligations on the other hand are duties; burdensome charges for him who has to fulfil them'.
17. On the textual history of *Théorie des fictions*, see Michaut, 'Introduction', p. 9
18. Bentham, *Théorie des Fictions*, p. 102: 'An obligation – understand here that sort of obligation which, through the medium of the will, operates on the active faculty – takes its nature from some act to which it applies itself; it is an obligation to perform or to abstain from performing a certain act. A legal obligation to perform the act in question is said to attach upon a man, to be incumbent upon him, in so far as in the event of his performing the act (understand both at the time and place in question) he will not suffer any pain, but in the event of his not performing it he will suffer a certain pain, viz. the pain that corresponds to it, and by the virtue of which, applying itself eventually as above, the obligation is created.'
19. Ibid., p. 202.
20. Ibid.
21. Ibid., pp. 202–4.
22. See Chapter 1, p. 14.
23. Bentham, *Théorie des Fictions*, p. 262.
24. See Brunon-Ernst, 'Délimiter la branche civile du droit'.

25. Bentham, *Théorie des Fictions*, p. 258.
26. Ibid., p. 264.
27. Ibid., pp. 262–4.
28. Ibid., p. 260: 'when a man is said to have a right (mentioning it), the existence of a certain matter of fact is asserted; namely, of a disposition, on the part of those by whom the powers of government are exercised, to cause him to possess, in so far as it depends upon them to have the faculty of enjoying, the benefit to which he has a right'.
29. See Cléro, *Bentham philosophe de l'utilité*, pp. 37–58. In his book, Cléro analyses utility from the perspective of one value among other competing values (truth, beauty, goodness).
30. UC MS, box 135, f. 67. I am grateful to Gianfranco Pellegrino, Marie Curie Fellow at the Bentham Project, UCL, for the transcripts of manuscripts on mathematics and fictions in box 135.
31. See for example 'A Real entity/A Body is an aggregate of fictitious entities. Bodies [Real entities] are distinguishable by the Properties/fictitious entities they are known to be made up of [to contain] and again by the degrees of them which they contain. To measure those degrees is the business of Mathematics .... Others there are which are stiled Chemical ones these are by the arts reduced to mechanical ones, *that they may come under the cognizance of/make their way to our senses*'. UC MS, box 135, f. 69 (my emphasis).
32. See G. Berkeley, *A Treatise concerning the Principles of Human Knowledge* (Dublin, 1710), p. 23: 'It is indeed an opinion strangely prevailing amongst men, that horses, mountains, rivers, and in a word all sensible objects, have an existence, natural or real, distinct from their being perceived by the understanding'.
33. 'Some properties however it is necessary should be supposed to be attributable to certain portions of quantity at pleasure: & this meanwhile be supposed: never we are naturally able to give to these portions of quantity those properties with a truth sufficient for all the purposes of [common] practice/life. Hence [?] it is, that these fundamental properties we cannot give to portions of quantity to such a nicety, i.e: to such a degree of proximity to truth: for natural truth is incontestably without/above our reach: since[?] we can always perceive some deviations[?] from it which our organs are unable to do away/correct/remove & which yet no mind can conceive when done away/corrected/removed' (UC MS, box 135, f. 31).
34. From the Panopticon onwards, the idea was discarded: see Bentham, *Postscript II*, p. 164, where the idea of analogy is kept; it originated in *An Introduction to the Principles of Morals and Legislation*, p. 178.
35. Quinn, 'Bentham, Utility and Truth'.
36. G. Pellegrino, 'The Benthams' Euclidean Training', presented at the New Directions in Bentham Studies conference, Bentham House, UCL, London, 9 December 2011.
37. History is not to be understood as restricted to meaning the discipline, but rather to include what Foucault calls: 'the fundamental mode of the empiricist' (Foucault, *The Order of Things*, p. 237). For a study of Foucault's historical methodology as archeology, see F. Delaporte, 'The History of Medicine according to Foucault', in J. Goldstein (ed.), *Foucault and the Writing of History* (Oxford; Cambridge, MA: Blackwell, 1994).
38. Foucault, *The Order of Things*, pp. 237–8.
39. See for example M. Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. D. F. Bouchard, trans. R. Hurley et al. (Ithaca, NY: Cornell University Press, 1977), pp. 29–196; Foucault, 'Truth and Power', pp. 111–33; M. Foucault, 'The Order of Things', in *Aesthetics*, ed. Faubion, trans. Hurley, pp. 261–7; Foucault, *The Archeology of Knowledge*.

40. Foucault, *The Order of Things*, p. 99.
41. Ibid., p. 102.
42. Ibid., p. 103.
43. Ibid., pp. 106–7.
44. Ibid., p. 108.
45. See for example Bentham, 'Economy as Applied to Office', p. 17.
46. M. Foucault, 'What is an Author?' (1969), in *Language, Counter-Memory, Practice*, ed. Bouchard, p. 138; also reproduced in *Aesthetics*, ed. Faubion, trans. Hurley et al., pp. 205–22.
47. M. Foucault, 'Language to Infinity' (1963), in *Language, Counter-Memory, Practice*, ed. Bouchard, p. 56; also reproduced in *Aesthetics*, ed. Faubion, trans. Hurley et al., pp. 89–101.
48. Foucault, *The Order of Things*, pp. 197, 206.
49. Ibid., p. 141.
50. Ibid., p. 147.
51. Ibid., p. 148.
52. Ibid., p. 46.
53. Laval, *Jeremy Bentham. Les artifices du capitalisme*, pp. 82–3.
54. J. Lacan, *Le séminaire, Livre VII. L'éthique de la psychanalyse*, ed. Miller J.-A. (Paris: Seuil, 1986). See also M.A. Soubbotnik, 'Le tissu de la fiction: approche de Bentham', *Revue du Littoral. Ecole lacanienne de psychanalyse*, 36 (1992), pp. 65–81.
55. Foucault, *The Order of Things*, p. 272.
56. Ibid., p. 273.
57. Ibid., p. 408.
58. Ibid., p. 421.
59. Foucault, *The Archeology of Knowledge*, p. 145.
60. Foucault, *The Order of Things*, p. 322.
61. Ibid., p. 213.
62. Ibid., p. 214.
63. Ibid., p. 418.
64. Foucault, 'Truth and Power', p. 120.

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